# THE NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

*NORTHERN IRELAND*

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY' COUNSEL

1926.

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# THE NORTHERN IRELAND LAW REPORTS.

1926.

## Lord Chief Justice.

The Right Hon. William Moore.

## Lords Justices of Appeal.

The Right Hon. James Andrews.
The Right Hon. Richard Best.

## Chancery Division.

The Hon. Daniel Martin Wilson.

## King's Bench Division.

The Right Hon. William Moore.
The Right Hon. Thomas Watters Brown.

## Attorney General.

The Right Hon. Anthony Brutus Babington, K.C.

# JUDGES AND LAW OFFICERS.

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## MEMORANDA.

1925

Oct. 1—The Right Honourable Sir Denis Stanislaus Henry, *Baronet, Lord Chief Justice of Northern Ireland, died at the age of 61.*

Nov. 2—The Right Honourable William Moore, *one of the Lord Justices of Appeal, was appointed Lord Chief Justice of Northern Ireland in the place of Sir D. S. Henry, Bart.*

Nov. 5—The Right Honourable Richard Best *was appointed a Lord Justice of Appeal in the place of the Right Honourable William Moore.*

Nov. 24—Anthony Brutus Babington, *one of His Majesty's Counsel, was appointed Attorney-General for Northern Ireland in the place of the Right Honourable Richard Best, and was afterwards sworn of the Privy Council of Northern Ireland.*

# DEATH OF THE FIRST LORD CHIEF JUSTICE OF NORTHERN IRELAND.

On October 27th, 1925, at the opening of the Michaelmas Sittings the members of the Bench and Bar and of the Solicitors' profession having assembled in the Court of King's Bench, the Lord Chief Justice designate (Lord Justice Moore), referring to the death of Sir Denis Henry, said he was a profound jurist and legal scholar, perhaps at his greatest in his knowledge of the statute law. He had never known any man who possessed such an unerring legal instinct. Even more extraordinary was his power of intuition and the intense rapidity of his mind. From the very day of his call he was ready and fully equipped for legal battle. He rapidly rose to be leader of the North-West Circuit, and from that to be one of the leaders of the Irish Bar. He served his country faithfully and with great courage as Attorney-General in times of danger and difficulty. They would always remember him there as the founder of that Supreme Court—the Court of his own creation, which he loved to his death.

They would not see that striking form commanding admiration and respect, his winning smile with his charm of manner, again in this mortal world. He was essentially human. Of no man could it more truly be said that he died without an enemy. To-day they mourned him, and, missing him, lamented the great Lord Chief Justice of Northern Ireland.

The Attorney-General (Right Hon. Richard Best, K.C., on behalf of the Bar, associated himself with the tribute that had been paid to the late Lord Chief Justice. Notwithstanding the great position Sir Denis Henry had held as advocate and as judge he was simple, in the best sense of the term, and while upholding the dignity of his office was a friend of everyone.

Mr. Joseph Allen, President of the Incorporated Law Society, Northern Ireland, said that the solicitors' profession looked upon the late Lord Chief Justice with feelings of admiration, affection, and love. His wise advice and counsel were always gladly given to their Society.

A great judge, a great son of Ulster, a great Irishman, and a courteous gentleman, beloved by all, had passed from out their bourne of time and place, and, in common with their lordships, the Bar, and the entire community, they mourned very deeply his early demise.

[These Reports will be cited as follows:—[1926] N.I.

# TABLE OF CASES REPORTED

IN THIS VOLUME.


A.

Attorney General, Craig *v.* 218

B.

Bailie *v.* Inglis and Company, Ltd. ... ... 53
*Barlow and Company and Others *v.* Hanslip ... 113
Belfast and County Down Railway, Greer *v.* ... 68
Bennett *v.* Kidd ... ... 50
Bruce *v.* Jackson ... ... 192

C.

Cantrell and Cochrane, Ltd., *v.* Nelson ... ... 107
Clarke *v.* Ferrie ... ... 1
Clonard Brick and Estate Company, *In re* ... 47
Coyle, Rex *v.* ... ... 208
Craig *v.* Attorney General 218

D.

Day, Maguire *v.* ... ... 80

E.

Edwards *v.* Old Bushmills Distillery ... 155, 162

F.

Ferrie, Clarke *v.* ... ... 1

G.

Gibson *v.* Reynolds ... 131
Gingles and Others *v.* Magill 234
Greer *v.* Belfast and County Down Railway ... ... 68

H.

Hall *v.* Wightman ... 92
*Hanslip, Barlow and Company and Others *v.* ... 113
Henry, Limited *v.* M'Glade 144

I.

Inglis and Company, Ltd., Bailie *v.* ... ... 53

J.

Jackson, Bruce *v.* ... ... 192

K.

Kidd, Bennett *v.* ... ... 50

L.

Lagan Navigation Company *v.* Lambeg Bleaching Company ... 13, 27
Lambeg Bleaching Company, Lagan Navigation Company *v.* ... 13, 27
Lindsay *re*, ... ... 128
Londonderry Corporation *v.* Osborne ... ... ... 58
Lyle's Estate ... ... 167
Magill, Gingles and Others *v.* ... ... ... ... 234

M.

Maguire *v.* Day ... ... 80
M'Farland and Talbot *v.* Montgomery ... ... 119
M'Glade, Henry *v.* ... 144
Montgomery, M'Farland and Talbot *v.* ... ... 119

N.

Nelson, Cantrell and Cochrane, Ltd. *v.* ... 107

O.

Old Bushmills Distillery, Edwards *v.* ... 155, 162
Osborne, Corporation of Londonderry *v.* ... ... 58

R.

Reynolds, Gibson *v.* ... 131
Reynolds, Thompson *v.* ... 131
Rex *v.* Coyle ... ... 208

T.

Thompson *v.* Reynolds ... 131
Timoney *v.* Timoney ... 75

W.

Wightman, Hall *v.* ... 92


*English King's Bench Division.

# TABLE OF CASES CITED.


PAGE

A.

Alison *v.* Jenkins ... 225
Allen *v.* Flood ... 4, 10
Amalgamated Society of Carpenters *v.* Braithwaite ... 3
American Thread Co. *v.* Joyce ... 161
Annie, The ... 226
Archbold *v.* Charters ... 177, 184
Armitage *v.* Moore ... 159
Attorney-General *v.* Antrobus 151
Attorney-General *v.* Great Eastern Railway Co. ... 200
Attorney-General (Down County Council) *v.* Lagan Navigation Company ... 18, 30
Attorney-General Southern Nigeria *v.* John Holt & Co. (Liverpool) ... 147
Augustein, *Re* ... 120

B.

Baird *v.* Wells ... 3
Barlow & Co. *v.* Hauslip ... 111
Batens Case 27, 28, 45
Batten *v.* Wedgewood Coal & Iron Co. ... 231
Blackhall *v.* National Union of Foundry Workers ... 3
Blake *v.* Albion Life Assurance Society ... 137
Blakemore *v.* Glamorganshire Canal Navigation ... 28
Bligh *v.* Rathangan Drainage Board 34, 35, 36, 45
Boughton *v.* Midland Great Western Railway ... 43
Boyle *v.* Ferguson, Ltd. ... 135
Brewster *v.* Kitchen ... 86
Brown *v.* Wren Bros. ... 134
Browne's Estate ... 232
Bruce *v.* Steen ... 202
Buckmaster *v.* Buckmaster ... 78
Burchard *v.* Macfarlane ... 55
Burrows *v.* Lang 146, 151, 153
Bushell *v.* Hammond ... 194
Byrne *v.* Meath 120, 124, 126

C.

Callwells *v.* Reilly ... 196, 206
Canadian Pacific Railway Co. *v.* Parke ... 30, 35
Canadian Pacific Company *v.* Roy ... 35

PAGE

Canning *v.* Farren 94, 97, 104
Carroll v. Keayes ... 121
Charman *v.* South-Eastern Railway Co. ... 71, 74
City & South London Railway Co. *v.* Rector and Churchwardens, St. Mary's, Woolworth ... 182
Claydon *v.* Green ... 187
Coffee *v.* Hamilton ... 178, 187
Coghlan *v.* Cumberland ... 179, 187
Commissioners Inland Revenue *v.* Eccentric Club, Ltd. ... 159
Conway *v.* Wade ... 3
Cooper *v.* General Accident Assurance Corporation ... 135
Cormack *v.* Digby ... 134, 135
Cox *v.* Burbidge ... 95, 100
Cracknell *v.* Corporation of Thelford ... 29, 30
Cullen *v.* Rialls, *Contract, re* 85
Cunningham *v.* Dunn ... 86
Cunningham *v.* Whelan 94, 95, 102

D.

D'Arcy *v.* Adamson ... 3
Davies *v.* Williams ... 37
Davoren *v.* Wooton ... 98
De Beers Consolidated Mines, Ltd. *v.* Howe ... 161
De Laubenque *v.* De Labenque 78, 79
Devonshire *v.* O'Connor ... 187
Dowling *v.* Robinson ... 134, 135
Drogheda Guardians *v.* M'Cann 78
Drewell *v.* Towler ... 149
Dyce *v.* Hoy ... 148

E.

Elder *v.* Carter ... 55
Ellis *v.* Bamyard 94, 100, 102
Ellis *v.* The Loftus Iron Co. 98
Emsley *v.* North-Eastern Railway ... 29, 30
Evans *v.* Delamere ... 29

F.

Fisher *v.* Keane ... 3
Fitzgerald *v.* Fitzgerald ... 78
Fletcher *v.* Rylands ... 95, 99
Fox *v.* Pett ... 195

G.

Gaffney *v.* Fetherstonhaugh 179, 187
Gage's Estate ... 226

| | PAGE |
|---|---|
| Galvin, *In re* ... | 129 |
| Garnet *v.* Bradley ... | 195 |
| Geddis *v.* Bann River Reservoir | 34, 42, 43 |
| Gerrard *v.* Crowe ... | 29, 30 |
| Gingell, Son, & Foskett, Ltd. *v.* Stepney Borough Council | 61 |
| Glamorganshire Canal Navigation *v.* Blackmore ... | 28, 30 |
| Godwin *v.* Schweppes, Ltd. | 149 |
| Goodwyn *v.* Cheveley ... | 98, 100 |
| Gracey *v.* Banbridge Urban District Council ... | 60 |
| Gradwell *v.* M'Cullagh ... | 187 |
| Graham, *In re* ... | 224 |
| Gray *v.* Allison & Orr ... | 3 |
| Gray *v.* Bond ... | 149 |
| Great Western Railway Co. *v.* Bater ... | 160 |
| Greenock Corporation *v.* Caledonian Railway ... | 29 |
| Grimsdick *v.* Sweetman ... | 84, 87 |

H.

| | |
|---|---|
| Hadwell *v.* Righton ... | 100 |
| Hammersmith Railway Co. *v.* Brand ... | 85 |
| Hanbury *v.* Jenkins ... | 149 |
| Hansford *v.* Jago ... | 148 |
| Harrisons Estate ... | 231 |
| Harrison *v.* Duke of Rutland | 146 |
| Harrison *v.* Great Northern Railway ... | 43 |
| Hawkins *v.* Wallis ... | 149 |
| Heather Garage, Ltd. *v.* Hodges | 94, 95, 101, 102, 105 |
| Henderson *v.* Eason ... | 239, 241 |
| Herbert *v.* Samuel Fox & Co., Ltd. ... | 159 |
| Heywood *v.* Mallalieu ... | 149 |
| Hibbs *v.* Ross ... | 135 |
| Hickman *v.* Maisey ... | 146 |
| Higgins *v.* Searle ... | 94, 95 |
| Hill *v.* Smith ... | 63 |
| Hoare *v.* Metropolitan Board of Works ... | 149 |
| Hodges *v.* Webb ... | 4, 10 |
| Hole *v.* Thomas | 237, 238, 239 |
| Howard *v.* Bergin O'Connor & Co. ... | 94 |
| Humphrey *v.* Peare ... | 159, 161 |
| Hungerfords Case ... | 63 |
| Hussey *v.* Hussey ... | 78 |
| Hutton *v.* Lipper ... | 109, 110 |

I.

| | |
|---|---|
| International Tea Stores Co. *v.* Hobbs | 147, 148, 151, 153 |
| Irish Insurance Commissioners *v.* Enniskillen Guardians ... | 130 |
| Irish Insurance Commissioners *v.* Tipperary C.C. ... | 130 |

J.

| | |
|---|---|
| Jacobs *v.* Seward | 237, 238, 239 |
| Job *v.* Potton ... | 237 |
| Johnson *v.* The King ... | 130 |
| Jones *v.* Festiniog Railway Co. | 43 |
| Jones *v.* Lee ... | 94, 100 |
| Jones *v.* Williams ... | 29 |
| Joyce *v.* Capel & Slaughter ... | 135 |

K.

| | |
|---|---|
| Kates *v.* Jeffery ... | 78 |
| Kearney *v.* Kearney ... | 237 |
| Kelly *v.* National Society of Operative Printers' Assistants | 4 |
| Keppell *v.* Bailey ... | 147 |
| Kerby *v.* Whichelow ... | 63 |
| Kutner *v.* Phillips ... | 195 |

L.

| | |
|---|---|
| Labouchere v. Earl of Wharncliffe ... | 3 |
| Lang *v.* Kerr, Anderson, & Co. | 200 |
| Lawrence *v.* Great Northern Railway Co. ... | 36 |
| Lemmon *v.* Webb ... | 29, 37 |
| Lewis *v.* Meredith ... | 147 |
| Lock *v.* Evans ... | 225 |
| Lombard *v.* Kennedy ... | 225 |
| Londonderry Corporation *v.* Moore ... | 61, 63 |
| Londonderry (Mayor of) *v.* M'Elhinney ... | 60 |
| Lowndes *v.* Bettle ... | 237 |
| Luby *v.* Warwickshire Miners' Association ... | 3, 7, 8 |

M.

| | |
|---|---|
| M'Cann *v.* Marquis of Downshire ... | 178, 187 |
| M'Carthy *v.* Conners ... | 121 |
| Maguire *v.* Day ... | 200 |
| Manchester, Sheffield, & Lincolnshire Railway *v.* Wallis | 71, 72, 73 |
| Martin Estates Co., Ltd. *v.* Watt & Hunter ... | 123 |
| Matthews *v.* Cork County Council ... | 159, 161 |
| Metge *v.* Kavanagh ... | 183 |
| Metropolitan Railway Co. *v.* Wright ... | 143 |
| Moody *v.* Steggles ... | 148 |
| Montgomery *v.* Swan ... | 237 |
| Murphy *v.* Davey ... | 225 |
| Murray *v.* Thorniley ... | 121 |

N.

| | |
|---|---|
| Neal *v.* Erving ... | 137 |
| Nelson & Sons, Ltd. *v.* Nelson Line (Liverpool), Ltd. ... | 55 |
| Newcastle (Duke of) *v.* Worksop Urban Council ... | 63 |
| Newtownards Commissioners *v.* Woods ... | 60 |
| New Zealand Shipping Co. *v.* Stephens ... | 160 |
| New Zealand Shipping Co. *v.* Thew ... | 160 |

PAGE

Nicholson *v.* Fields ... 195
Nield *v.* London & North-Western Railway ... 28

O.

O'Connor *v.* Smith ... 202
O'Geran *v.* M'Swiney ... 225
O'Kane & Co. v. Commissioners of Inland Revenue 159, 160
O'Shea *v.* Wood ... 55

P.

Pape *v.* Pape ... 78
Parkinson *v.* Parkinson ... 78
Penruddocks Case ... 29
Philpots *v.* Bath ... 148
Porter *v.* Pigeon ... 120
Postmaster-General *v.* Great Southern & Western Rly. Co. 130
Potter *v.* North ... 151
Powell *v.* M'Glynn & Bradlaw 133, 134, 135
Powers Policies, *In re* ... 225, 226

R.

Ralli Bros. *v.* Compania Naviera Sota Y Aznar ... 86
Raynor *v.* Mitchell ... 134, 135
R. *v.* Baskerville ... 209, 215
R. *v.* Brazier ... 211
R. *v.* Brown ... 181
R. *v.* Camelleri ... 210
R. *v.* Christie ... 210, 216
R. *v.* Evans ... 210
R. (M'Glinchey) *v.* Greer ... 84
R. *v.* Irish Land Commissioners 179
R. (Donohue) *v.* Justices of Armagh ... 83, 89
R. (Collins) *v.* Justices of Donegal ... 83
R. *v.* Leresche ... 78
R. *v.* Lillyman 210, 212, 217
R. *v.* Matthews ... 45
R. *v.* Merry ... 210, 216
R. *v.* M'Inulty ... 209
R. *v.* Osborne 210, 216, 217
R. *v.* Paul ... 209
R. *v.* Stuffs ... 186
R. *v.* Whistnant ... 209
Ricketts *v.* East & West India Docks, &c., Co. ... 71, 74

PAGE

Royal Commissioners of Wheat Supplies *v.* Usher & Co., Ltd. 84
Royal Mail Steam Packet Co. *v.* George & Branday ... 148
Ryan *v.* Byrne ... 225

S.

St. George's Estate ... 226
Samson *v.* Aitchison ... 133
Sanderson *v.* Collins ... 133
Schiller, The ... 226
Senecal *v.* Pauze ... 109, 110
Shaw *v.* Kay ... 51, 52
Simpson *v.* Weber ... 149
Smith *v.* Portsmouth Justices 194
Spokes *v.* Grosvenor Hotel Co., Ltd. ... 55
Stollmeyer *v.* Trinidad Lake Petroleum Co. ... 30
Stourbridge Canal Co. *v.* Wheeley ... 28
Studdert, *In re* Finance Act, 1894 ... 61
Sutton *v.* Sutton ... 86, 200

T.

Tillet *v.* Ward ... 99
Turner *v.* Coates ... 95

V.

Vacher & Sons, Ltd. *v.* London Society of Compositors ... 4, 11
Vaughan *v.* Taff Vale Railway ... 43

W.

Watkins *v.* Vince. ... 137
Welis *v.* Miles ... 63
Wellwood *v.* King ... 133, 134
Weld *v.* Gaslight Co. ... 42
Whalley *v.* Lancashire & Yorkshire Railway ... 28
White *v.* Reilly ... 4
White *v.* Williams ... 147, 149
Willis *v.* Baddeley ... 54
Wing Lee *v.* Lew ... 98
Woking Urban District Council, *In re* ... 195
Wolstenholme *v.* Amalgamated Musicians' Union ... 6
Wood *v.* Wood ... 3

# CASES

DETERMINED BY

# THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

# THE COURT OF APPEAL

IN

# NORTHERN IRELAND.

---

## CLARKE

v.

## STANLEY FERRIE AND OTHERS.

*Trade Union—Rules—Expulsion of Member by Branch Committee—Ultra Vires—Injunction—Action of Tort—Competency—Trades Disputes Act, 1906 (Edw. 7, c. 47) s. 4, sub-s. 1.*

Ch. Div. 1925

July 30, 31
Aug. 27

One of the rules of a workers' Trade Union provided that any member disseminating false statements or any rumour which tended to depreciate the organisation, its officers, or any section appertaining to the Union should be dealt with by the branch or Union as might be deemed fit.

The plaintiff, a member of the Union, having formulated charges, which he failed either to withdraw or to substantiate, of bribery, drunkenness, corruption and inefficiency against the Committee, was summoned to attend a meeting and having had a full opportunity of explaining his position was expelled by the Branch Committee. In an action by the plaintiff seeking to have the resolution of expulsion declared ultra vires and void and also claiming damages against the

Ch. Div. 1925

CLARKE v FERRIE

defendants for having prevented him from obtaining employment.

*Held*, by Andrews LJ., that the rule while conferring a wide power to deal with recalcitrant members in no way empowered the Branch Committee to determine membership. A power of expulsion must be found in the rules and does not exist apart from them. *Luby v. Warwickshire Miners' Association* ([1912] 2 ch. 371) applied.

*Held* further that the action, so far as it sought damages for alleged tortious acts by the secretary or Committee of the Trades Union, could not be entertained inasmuch as Section 4 (1) of the Trades Disputes Act, 1906 (6 Edw. 7 c. 47) conferred such a general immunity upon Trade Unions as even to make it obligatory upon the Court to stay such an action as soon as it is made aware of its existence.

TRIAL OF ACTION for a declaration that the resolution of the defendants, the Committee of the Northern District Branch of the Amalgamated Transport and General Workers' Union passed on 6th May, 1925, whereby it was resolved that the plaintiff be expelled from the said branch and ordered to hand in his card and badge of membership, was ultra vires and void, and that the plaintiff was still a member of the said branch. The plaintiff also sought an injunction restraining the defendants and their servants, and the servants of the said branch, from excluding the plaintiff from the premises of the said branch, or preventing him from exercising the rights and privileges of membership of the said union and branch; and a further injunction restraining the defendants and their servants, and the servants of the said branch, preventing the plaintiff from obtaining employment as a labourer at the docks, wharves, riverside, and warehouses, or from doing anything or taking any steps for the purpose of, or with the view to preventing, or which might prevent the plaintiff obtaining such employment, or from otherwise interfering with the plaintiff in the exercise of his rights, and for damages, not specifying the particular cause of action in respect of which damages were claimed.

The defendants, who are the Committee of the Northern District Branch of the Union, were sued as such, and not in their individual capacity.

The action was heard by Andrews LJ., sitting for Wilson J. The plaintiff became a member of the branch on 16th December, 1918, and, with the exception of a period of limited duration during the disturbances in Belfast of a few years ago,

he continued such until the Committee purported to expel him on 6th May, 1925. On Saturday, 7th March, 1925, a vessel came into port with a cargo of slates consigned to Messrs. Kirker Robb. As Saturday was a short working day, and overtime rates would have become operative after 12 o'clock, the consignees endeavoured to postpone the discharge of the vessel until the following Monday. The men who had been employed resented this, and made representations to Messrs. Kirker Robb, through Murray, the branch secretary, that as the boat had berthed before 8 a.m. on Saturday the cargo, according to the existing regulations, should have been unloaded on that day. Murray pressed his case so strongly and with such success that the consignees ultimately agreed that the men engaged in the discharge should receive double pay for their services on the Monday. The plaintiff, who was one of the men engaged, was sent with four others to stack up the slates in the yard. After their day's work the consignees tendered these five men only a single day's pay of 18s 5d, contending that they were not engaged, as the other men at the dock were, in the work of discharge. The men were not unnaturally dissatisfied, and the plaintiff forthwith wrote a letter, dated 10th March, to Mr. Ernest Bevan, the general secretary of the union, recounting their grievance.

*Leech, K.C.* and *Reid* for the plaintiff :—

The power to expel can only be given by express words, *Luby* v. *Warwickshire Miners' Association* (1), *Amalgamated Society of Carpenters, &c.* v. *Braithwaite* (2), *Blackall* v. *National Union of Foundry Workers* (3). Before a member can be expelled he must have fair, adequate, and sufficient notice *Fisher* v. *Keane* (4), *Labouchere* v. *Earl of Wharncliffe* (5), *Gray* v. *Allison and Others* (6), *D'Arcy* v. *Adamson* (7), *Wood* v. *Woad* (8), *Baird* v. *Wells* (9).

We also contend that the Branch had no power to expel, and that an improper authority has been usurped by the committee. We rely also on *Conway* v. *Wade* (10).

(1) [1912] 2 Ch. 371.
(2) [1922] 2. A.C. 440.
(3) 39 T.L.R. 431.
(4) 11 Ch. D. 353 at p. 362.
(5) 13 Ch D. 346.
(6) 25 T.L.R. 531.
(7) 29 T.L.R. 367 at p. 368.
(8) L. R. 9 Ex. 190 at p. 196.
(9) 44 Ch. D. 661.
(10) [1909] A.C. 506

Ch. Div. 1925

CLARKE v FERRIE

*M'Gonigal K.C. and Fox* for the defendants :—

Asked for a direction in favour of the main defendants in the action, but his Lordship did not accede to this. Counsel relied upon *Vacher & Sons, Ltd.*, v. *London Society of Compositors* (1). Murray, the secretary of the branch, is not sued at all. This is purely and simply a representative action. We rely on *Allen* v. *Flood* (2), and especially on the judgment of Lord Macnaghten. We also rely on *White* v. *Riley* (3), and *Hodges* v. *Webb* (4). If Murray, the secretary of the branch, was only doing what he was legally entitled to do no action lies. The committee are the agents of the plaintiff, as much as of the defendants, this being a representative action *Kelly* v. *National Society of Operative Printers' Assistants* (5). Treating this as a personal action, there is no evidence that the committee directed or authorized the acts of Murray.

*Cur. adv. vult.*

Aug 27

ANDREWS L.J. stated the facts as above set out and proceeded :—So far as the letter to Mr. Bevan consists of a narration of the facts to which I have just referred no serious exception can be taken to its accuracy; but the writer proceeds to indulge in a tirade of unrestrained vituperation against the branch secretary, whom he accuses of keeping out of the way to avoid an interview as he was getting "a tip behind backs." Then follows an attack on the whole committee. "I will give to understand," he writes, "there is simply no person at the head of affairs here. Red (sic) out the lot. For if there is a meeting of the committee all the (sic) want is their 2/- and go and have a drink, a bloody rot. You seem to know nothing about all this chorks (sic. query all these sharks) is getting tiped (tipped) behind backs." In a "P.S.," which is, however, to be found in the body of the letter, the plaintiff adds :—"There is about 12 hundred men is willing to have the show busted or Murray cleared out and all out of the office." In a further "P.S." he continues :—"Did you ever consider of getting a counting

(1) [1913] A. C. 107.
(2) [1898] A. C. 1.
(3) [1921] 1 Ch. 1.
(4) [1920] 2 Ch. 70.
(5) 84 L. J. (K.B.) 2236 C.

house for the dock labours (sic)? Did you ever try and have all put to one Irish Transport. You could not go next or near a meeting here—all read (sic) tape, all drunk cloding the chairs at one and other all looking for a pull behind backs." The plaintiff further indulges in the last paragraph of the letter in language of a character which I would prefer not to read in court. It is unnecessary for me to do so, as the general tone of the letter is already clear; and it fully justifies Mr. McGonigal's comment that it charges offences of an extremely serious character, including bribery, drunkenness, corruption, and inefficiency, and that the object behind all was, as the plaintiff admitted, either to get Murray cleared out, or to get all the dockers into another union, namely, the Irish Transport Workers' Union. Whether there be any foundation in fact for these charges, can only be determined by me on the evidence before me, which I may unhesitatingly say completely fails to establish any of them; and, indeed, under pressure on cross-examination the plaintiff admitted that he did not himself believe certain of the charges which he made, and vainly endeavoured to assign the responsibility for them to other men whom he had heard " speaking of them."

This letter was in due course forwarded by Mr. Bevan to Mr. Gillespie, who resides in Dublin and is the area secretary of the union for the whole of Ireland. After a preliminary investigation at a meeting of the committee of the branch it was decided that the matter should be fully enquired into at a further meeting to be held on 6th May. Plaintiff was sent by Murray a summons to attend this meeting, at which, he was informed, that the charge which he had made against Murray and the Committee would be considered. The plaintiff attended. There is some discrepancy in the evidence as to what actually occurred at the meeting; but I am satisfied that plaintiff was afforded every reasonable opportunity of retracting, and that he emphatically refused to do so, stating that he was prepared to prove everything he said about Murray, but that he would not do so then but in a court of justice. Having failed to withdraw or to substantiate the charges, he asked, as appears by his own evidence, if his case was

Ch Div. 1925

CLARKE v. FERRIE

finished, to which the defendant Ferrie, who was in the chair, replied that it was in the hands of the committee. The plaintiff then retired saying, " You have my address and let me know the result."

The result proved to be the resolution of expulsion which is challenged as ultra vires in this action. As it appears in the minutes it reads as follows:—" That Clarke be expelled from this branch and he hand in his card and button." This was duly communicated to the plaintiff by Murray by letter of the following day.

The first question to be determined is whether it was within the powers of the committee of the branch to pass this resolution of expulsion. It lies upon the defendants to justify their action; and it must be borne in mind as pointed out by Eve J. in *Wolstenholme* v. *Amalgamated Musicians' Union* (1), that the power to expel must be found in the rules, and does not exist apart from them. Mr. McGonigal, who appeared for the committee, relied upon Rule 9 (21) which reads as follows:—

" Any member disseminating false statements or any rumour which tends to depreciate the organisation, its officers, or any section appertaining to the union, or circulating any business of the union to unauthorized persons, without authority, shall be dealt with by the branch or union as may be deemed fit."

Having given the matter very careful consideration I am clearly of opinion that this rule did not empower the committee to pass the resolution complained of. There may be some doubt, as Mr. Leech suggests, as to whether the writing of the letter by plaintiff to the general secretary of the union and his showing it to the other four men who had been working with him in Messrs. Kirker Robb's yard amounted to a " disseminating ' of false statements within the rule. It may also be that the powers conferred by the rule can only be exercised by the " branch or union " as distinguished from the " committee," who are expressly empowered to deal with members under Rule 9 (8) in circumstances wholly different from the present. But I prefer to decide the case upon the broader ground that a power " to deal with a member as may be deemed fit " does not enable the body on whom it is conferred to

(1) [1920] 2 Ch. 388 at p. 394.

take the extreme and drastic course of expelling such person from membership. Membership of a society carries with it privileges and rights of property of which a member can only be deprived by clear and express authority. Does then the power to " deal with " a member as may be deemed fit, include a power of expulsion? Even if the matter were without authority I would gravely question any such proposition; for, in my opinion, whilst conferring a wide power to deal with recalcitrant members it in no way empowers the governing body to determine that membership, and with it all those proprietary rights and privileges to which I have referred. But I find the clearest judicial confirmation of my opinion. In *Luby* v. *Warwickshire Miners' Association* (1) the rule of the association to the effect that " disputes between members of the society should be dealt with by the council, whose decision should be final and binding in all cases " was relied upon by the defendants in justification of a resolution of expulsion. Neville J., however, held that this rule was of no avail. " In my opinion," he said, " the association was without power to expel a member. There was no rule purporting to give them such power, and, even, had they possessed it, the attempt to expel the plaintiff without giving him an opportunity of obtaining a hearing would in my opinion have been illegal."

This judgment is in my opinion conclusive, for I do not consider that there is any substance in the point which Mr. McGonigal sought to make, that a distinction is to be drawn between the rule, which I have quoted, in *Luby's* case (1) and Rule 9 (21) in the present case by reason of the addition in the latter rule of the words " as may be deemed fit." To my mind it is a distinction without a difference. I am inclined to think that on their true construction these words are intended to refer to the tribunal who should determine the case, i.e., that grammatically they govern or are to be read in connection with the words " branch or union "; but, if I am wrong in this, and if the words are intended to refer to the powers possessed by the branch or union, they do not seem to me to make

(1) [1912] 2 Ch. 371.

Ch. Div. 1925

CLARKE v. FERRIE

any real addition, as in the absence of other controlling words they would in my opinion be implied.

If there were any doubt as to whether in so holding I have given too restricted a meaning to the powers of the branch or union, it would in my opinion be removed by the provisions of Rule 5 (14) by which the General Executive Council of the union is empowered (inter alia) to "Suspend or expel any member . . . . whether temporarily or permanently, for such reasons and on such terms as they may deem expedient, and their decision save as herein provided shall be final and conclusive for all purposes, provided that every member shall have the right within four weeks of the decision of the General Executive Council to give notice of appeal and to appeal to the Appeals Committee, and the decision of such committee thereon shall be final." The conferring of this power of expulsion in express terms upon the General Executive Council subject to a right of appeal to a special Appeals' Committee is wholly inconsistent with the existence of a co-ordinate jurisdiction in a Branch Committee whose decisions are not made open to review. It was obviously the intention of the framers of the rules to withdraw the serious question of expulsion from the prejudices, sympathies, and, it may be, partisanship of local tribunals to the more judicial atmosphere in which the General Executive Council and Appeals' Committee conduct their deliberations; and this is made further apparent by the provisions of Rule 19 (3) under which the question whether a person has failed to abide by the rules of the union and has thereby incurred a liability to forfeiture of membership must be determined by the General Executive Council.

This is sufficient in my opinion to determine the first branch of the case; and I would only add that I do not base my judgment in any way upon the further ground relied upon by Mr. Leech, and upon which also *Luby's* (1) case was determined, as I consider that the plaintiff had full notice of the charge which was preferred against him, and was given a full opportunity of explaining his position. He says that he knew before he went to the

(1) [1912] 2 Ch. 371.

meeting that he was going to be asked to prove the charges or withdraw them. He admits that he knew that the committee were going to deal further with his case that night after he left, and that he requested them to write him their decision as they knew his address. There was therefore nothing in his expulsion which was in any way at variance with the principles of natural justice.

I shall, therefore, make a declaration in the terms sought in the prayer of the statement of claim that the impugned resolution was ultra vires and void, and that the plaintiff is still a member of the branch. Certain technical difficulties were raised at the hearing as regards my jurisdiction to give the ancillary relief sought by way of injunction to restrain the defendants from excluding the plaintiff from the branch premises; and, as this injunction was not pressed at the hearing, I make no order regarding it.

I pass to the remaining portion of plaintiff's claim in which he complains of the defendants and their servants preventing him from obtaining employment. The defendant's first contention is that plaintiff's evidence was that the only person who interfered with him getting work was Murray, the branch secretary, who is not a defendant, and that he was not their agent, having no authority express or implied from the Committee to act as he did. This is a very doubtful point on the rules and evidence given before me, and I deliberately refrain from expressing any opinion upon it as it is unnecessary for me to do so for the purposes of my decision.

Mr. M'Gonigal's next submission was that, even if plaintiff's evidence be accepted, it does not disclose any actionable wrong. What does this evidence amount to? That, when plaintiff was working with the Clyde Shipping Company, Murray came into the shed and said "Clarke, you will not get leave to work here"; whereupon plaintiff went to M'Curdie, the stevedore, and handed back his check. Again that on 19th May plaintiff asked a stevedore named Gill for work, but that the latter did not employ him though he had given him work on previous occasions. Finally, that on 23rd May, when plaintiff was working for Spratt, the stevedore, at the Glasgow Shipping

Ch. Div. 1925

CLARKE v FERRIE

Company's premises Murray came and said he wouldn't get leave to work there. Murray traverses much of this evidence, but admits that he did try to prevent Spratt, the stevedore, employing plaintiff, and that in so doing he was endeavouring to enforce an unwritten law of the union that when there is a sufficient number of union men available for work they should obtain employment before non-union men. None of these statements discloses in my opinion any actionable wrong. Mr. McGonigal directed my attention to several passages in the speeches of the Law Lords in *Allen* v. *Flood* (1), but I shall not refer to them in detail as their effect is accurately summarised in Halsbury, Vol. 27, pp. 651-3. It is not actionable in an individual to ask or persuade a person to do or to refrain from doing an act which that person may lawfully do or refrain from doing, even though a third party is thereby injured in his trade. Further, it is not an actionable wrong for an individual merely to induce a person not to serve or not to employ another, where no breach of contract is thereby caused, unless such inducement be accompanied by violence, or threats, or fraud, misrepresentation, intimidation, obstruction, or molestation, coercion, or other illegal means. Eve J. put it briefly in *Wolstenholme* v. *Ariss* (2), that to maintain an action of this character a plaintiff must prove that in order to procure their object the defendants resorted to threats, coercion, or other illegal means. Inducement not to continue an employment is illegal only if it is exercised by the use of illegal means. These principles appear to me to apply to the present case. The employment of a docker is of the most casual character imaginable, and could be determined, as I understand it, at any time, without notice without involving any breach of contract; and there is not a particle of evidence to warrant me in arriving at the conclusion that violence, threats, coercion, or other unlawful means of the character indicated were employed. As to what constitutes threats or coercion, the judgment of Peterson J. in *Hodges* v. *Webb* (3) will be found most instructive. As Lord Herschell said in *Allen* v. *Food* (4),

(1) [1898] A. C. 1.
(2) [1920] 2 Ch. 403 at p. 409
(3) [1920] 2 Ch. 70 at pp. 85-87
(4) [1898] A.C. at p. 129.

" The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning."

Finally, the plaintiff in my opinion is debarred from relief on this part of his claim by S. 4 (1) of The Trades Disputes Act, 1906, which enacts that an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court. If Murray's acts were unlawful they would obviously be tortious in character; and, as a trade union by section 5 (2) of the same Act includes the branch of a trade union, section 4 (1) would, if necessary, afford a complete defence. It was no doubt at one time suggested that the operation of S. 4 (1) was more limited than might at first sight appear from the seemingly general terms in which it is couched, and that it only applied to acts done in contemplation or furtherance of a trade dispute; but any doubt that existed in this matter was removed by the House of Lords in *Vacher & Sons, Ltd.*, v. *London Society of Compositors* (1), where on motion the defendant society, who were sued jointly with their secretary and organising secretary, got their name struck out of the writ and all subsequent proceedings in the action, the House being of opinion that the section was general in its application. At p. 127 Lord Moulton pointed out with characteristic lucidity that the section conferred upon trade unions such a general immunity in respect of actions of tort as to make it obligatory upon the court to stay such an action as soon as it is made aware of its existence, for the section provides that such an action should not be " entertained," and to allow it to come to trial would be to entertain it.

In the result the plaintiff succeeds in so far as he impugns the resolution of expulsion, and he fails in so far as he charges the defendants with preventing him from obtaining employment, which is in law a wholly distinct cause of action. As each party succeeds in part and

(1) [1913] A.C. 107.

Ch. Div. 1925

CLARKE v FERRIE

fails in part, I have, after careful consideration, come to the conclusion that the simplest order to make, and the one which in my opinion most fully accords with the the justice of the case will be to direct that each party shall bear his or their own respective costs of these proceedings.

Solicitor for the plaintiff: *J. W. T. Watters.*

Solicitor for the defendants: *John Graham.*

J.McC.

[IN THE COURT OF APPEAL.]

# THE LAGAN NAVIGATION COMPANY, LTD.,

v.

# THE LAMBEG BLEACHING, DYEING AND FINISHING CO., LTD. (1)

## (1924. No. 21.)

*Negligence—Canal Navigation Company—Flooding of adjoining lands — Negligent exercise of statutory powers—Damages appropriate remedy not statutory compensation—Abatement of nuisance by person injured—19 & 20 Geo. 3, c. XXXII. (Ir.) sects. 1 and 13; 54 Geo. 3, c. CCXXXI., s. 2; 6 & 7 Vict. c. CIV. (Local), ss. 2, 5, 62, 144, 204.*

Ch. Div. 1924 July 28, 29 31 Dec. 18 1925 Feb. 24 Mar. 24

C. A. June 22, 23, 24 Nov. 4.

A private Act of 27 Geo. II. c. III. empowered a corporation to make a canal; under subsequent Acts large sums of money were subscribed by different persons for the purpose of carrying on and improving the navigation of the said canal; and by Act of Parliament 54 Geo. III. c. ccxxxi. (Local), a company of undertakers was incorporated and all the property of the canal was vested in the said company. By 6 and 7 Vict. c. civ. (Local), all the property, rights, and liabilities of the said company were transferred to and vested in the plaintiffs. The main purpose of these several Acts of Parliament was to make a navigable waterway by canalizing a river and cutting a canal.

In 1912 the plaintiffs raised the coping round one of the locks and the banks behind it about fifteen inches to prevent flood water flowing over the sides of the lock which they alleged interfered with the navigation of the canal. The defendants alleged that by such works the plaintiffs had penned back the flood water on the defendants' lands. In 1921 the plaintiffs removed the raised coping without prejudice to their right, but this did not reduce the height of the banks. In January, 1924, there was a heavy flood in the river and canal, and the defendants cut away a sufficient amount of the banks to allow the flood water to run away.

In an action by the plaintiffs for an injunction to restrain the defendants from entering upon the lands of the plaintiffs, and from digging, excavating, removing or interfering with the soil:

*Held*, by the Court of Appeal (Moore C.J. and Andrews L.J.), reversing Wilson J., that though the plaintiffs were entitled under their private Acts, from time to time to amend their canal works, they were bound in so doing to take reasonable precautions to prevent the defendants' lands being flooded; that their failure to do so amounted to negligence; and applying *Geddis* v. *Bann River Reservoir* (3 App. Cas. 430) that the plaintiffs were liable for the resulting damage to the defendants.

(1) In the Court of Appeal before Moore, C.J. and Andrews, L J.

Ch. Div. 1924

LAGAN NAVIGATION CO. v. LAMBEG BLEACHING CO.

*Held* further that the defendants' remedy was damages for the tortious and negligent acts complained of, and not compensation for loss resulting from a legitimate exercise of powers under the statute authorizing the plaintiffs' works.

APPEAL from the judgment of Wilson J. in an action brought by the plaintiffs for damages for trespass by the defendants on one of the locks of the plaintiffs' canal, and for an injunction to restrain the defendants from interfering with the lock and cutting away portion of the banks.

The plaintiff company was created under an Act of 1843, 6 & 7 Vict. c. civ., which vested in the plaintiffs all the undertaking of the Lagan Canal under several previous Acts of Parliament, the main purpose of which was to make a navigable waterway from Belfast to Lough Neagh by canalizing the River Lagan from Belfast to Spencer's Bridge, and from thence to cut a canal to Lough Neagh The lock in question was on portion of this cut.

Some time prior to August, 1912, the plaintiffs raised the coping along the upper mouth of the lock and down to the upper gate by placing concrete along it to a height of about fifteen inches, and raised the embankment on both sides of the lock with earth so as to correspond with the raised coping. The object of this erection was to prevent flood water coming down this reach of the canal, flowing over the lock and into its chamber, or down to the lower reaches of the canal. In 1912 the defendants objected to this erection and called for its removal, and in February, 1921, the additional coping was removed without prejudice to plaintiffs' rights. It was alleged by the defendants that the embankments at the back of the coping still remained and that sod banks had been erected at each end of the lock to control the flow of water in time of flood, and that the effect of this was to pen back the flood water on to the defendants' lands. The defendants occupied premises along the banks of the canal and had an opening or culvert through the bank of the canal which let water from the canal into defendants' premises or from defendants' premises into the canal, according as the water in the canal or on defendants' premises was higher.

On 18th January, 1924, there was a very heavy flood both in the river and in the canal which caused flooding on the defendants' lands. On that day the defendants'

servants cut channels along the length of the lock on both sides and let the water above the level of the old coping run into the lower reaches of the canal. These channels were subsequently filled in by the defendants' servants.

The plaintiffs claimed an injunction to restrain the defendants from further interference with their banks. The defendants counter-claimed for (1) an injunction to restrain the plaintiff company, their servants and agents from erecting or maintaining the mounds or any part thereof or any similar mounds or other device calculated to raise the level of the water in the part of the Lagan Canal or River Lagan above the lock or to cause flooding of the lands of the defendants.

(2) A mandatory injunction to compel the plaintiff company to remove the mounds forthwith.

(3) An injunction to restrain the plaintiff company, their servants and agents from placing or maintaining boards on the top of or raising the height of the gates of the lock.

(4) Damages.

By an Act of 54 Geo. III., c. ccxxxi., s. 2, power was given

"to repair, maintain, amend and uphold all such works and other things as have already been erected, made, or done under or by virtue of the recited Acts or any of them, and also to make, erect . . . and perform all such works, matters and things as shall be requisite and convenient for making, completing and maintaining the several canals by this Act authorized."

By section 62 of the Act 6 & 7 Vict., c. civ. (Local) it was further provided that

"the Company shall at all times during the continuance of the said Act (i.e., for thirty-one years) maintain and keep . . . all works, bridges . . . retaining and other walls, fences, and embankments upon or connected with all county or other roads made and constructed by the said company . . . in good and substantial and serviceable repair, and in an efficient state for all the purposes thereof, and of the traffic on the same respectively."

By section 144 of the Act 6 & 7 Vict. c. civ. (Local) power was given to

"repair, maintain, amend, and uphold all such works and other things as have already been erected, made, or done under or by virtue of the hereinbefore recited Acts or any of them."

Section 204 of the same Act re-enacted section 31 of 19 & 20 Geo. 3 c. xxxii. as to persons maliciously damaging any of the works of the said navigation.

Ch. Div. 1924

LAGAN NAVIGATION Co. v. LAMBEG BLEACHING Co.

*Megaw K.C.*, *Pringle K.C.* and *Warnock* for the plaintiffs.

*Babington K.C.*, *Murphy K.C.* and *Black* for the defendants.

WILSON J. :—

Dec. 18

This action is brought by the plaintiffs for an injunction to restrain the defendants from entering on the plaintiffs' undertaking and removing the soil and portion of the embankment erected by the plaintiffs at Lock 8 and for damages. The defendants traverse the plaintiffs cause of action and justify the doing of the acts complained of by way of abating a nuisance which the defendants allege the plaintiffs had created on their lands in penning back the water in the canal and flooding defendants' lands and fouling some fresh water springs and dams on the defendants' lands with foul water from the canal during times of flood, and defendants claim an injunction to restrain the plaintiffs from raising the upper gate and the walls at the mouth or along the course of Lock 8, above the level at which they were originally constructed or otherwise preventing the flood water in this reach of the canal from flowing away over Lock 8 and away from the defendants' lands.

I find the facts leading up to the dispute to be :

(1) Some time prior to August, 1912 the plaintiffs raised the coping along the upper mouth of Lock 8 and down to the upper gate by placing concrete along it to the height of about 15 inches and raised the embankment on both sides of Lock 8 with earth so as to correspond with the raised coping. I think this is proved both by the oral evidence and the condition of the old pawl which has been partly excavated and shews grooves on it below the surface of the ground. The object of this erection was to prevent flood water coming down this reach of the canal from flowing over Lock 8 and into its chamber, or on down to the lower reaches of the canal. I conclude that it was made effectual for this purpose and that until the flood water at Lock 8 rose 15 inches over the level of the old coping this flood water was penned back in the reach of the canal above Lock 8. The defendants cannot complain of this erection save to the extent to which it injures them, which I will endeavour to ascertain later. In 1912 the defendants objected to this erection and called for its removal, and after

a tedious correspondence the additional coping was removed in February, 1921, without prejudice to plaintiffs' rights. It was alleged by the defendants that the embankments at the back of the coping still remained and that sod banks had been erected at each end of the lock to control the flow of water in time of flood. Nothing happened from 1921 till 18th January, 1924, when there evidently was a very heavy flood both in the river and the canal and all over this part of the country—on that day a number of the defendants' servants proceeded from their works along the towing path up to Lock 8, found an embankment along the mouth and sides of the lock which prevented the flood water from getting away over Lock 8 and against the protests of the only employee of the plaintiffs present cut channels right along the length of the lock on both sides and let the water above the level of the old coping run along Lock 8 and into the lower reaches of the canal. The plaintiffs immediately restored the embankments and defendants again on 21st January, 1924, entered on Lock 8 and again removed them. The plaintiffs' and defendants' contentions are adequately stated in the plaintiffs' letters of 19th January, 1924, and 23rd January, 1924, and the defendants' letter of 25th January, 1924.

The first question in this action is, were the plaintiffs entitled to cut away these embankments down to the level of the old coping at Lock 8? The plaintiffs are a company originally incorporated under 6 & 7 Vic. c. civ. for 31 years extended by further Acts of 36 Vic. c. lxv. and 51 & 52 Vic. c. cxxxvii. for 999 years. The Act of 1843 vested in the plaintiffs the whole then existing Lagan Navigation undertaking and all the rights, privileges and advantages of the company of undertakers of the Lagan Navigation vested in them on or previous to the 24th December, 1835, under the previous Acts and all powers, which might have been exercised by the said company of undertakers except as therein provided. The object of these prior Acts was to open a passage by water from Lough Neagh to Belfast and to make the River Lagan navigable from the town of Belfast to or beyond the bridge known as Spencer's Bridge and from thence to cut a canal in the most convenient manner to Lough Neagh, making provision for compensation to proprietors of lands affected, and they were empowered to make all such aqueducts, passages, dams and

Ch Div. 1924

LAGAN NAVIGATION CO. v. LAMBEG BLEACHING CO.

weirs as might by the undertakers be judged necessary for carrying on said works or for supplying the said canals and navigations with water, and were also invested with all the powers of their predecessors for the purpose of carrying on the navigation from Belfast to Lough Neagh and of making inter alia such locks and banks as might be judged by said Company proper for said work, and it was provided that any one who wilfully or maliciously broke down or damaged or caused to be broken down or damaged any of the works already made or which should be made for the use of the said navigation and was convicted thereof on information or indictment should forfeit treble the sum necessary for repairing such damage and the offender should be committed to gaol till he paid such damage. By 54 Geo. 3, c. ccxxxi., s. 2 mention is made of Locks 9 and 8, but it is not proved whether the work there mentioned was carried out or not; and power was given to repair, amend and uphold all the undertaking and also for preserving and maintaining the undertaking and doing all such other works, matters and things as the company should think necessary and expedient for the benefit of the said several improvement and other works. By sec. 62 of the Act of 1843 the plaintiffs are bound to keep the navigation and every part thereof and inter alia all locks, banks, towing paths in good and substantial and serviceable repair and in an effcient state for all the purposes thereof and of the traffic on the same respectively. The House of Lords decided in *The Attorney-General (At the Relation of the Co. Council of Down)* v. *The Lagan Nav. Co.* (1) on this and other sections that there was no obligation on the plaintiffs to build or rebuild their bridges over the canal sufficiently strong to carry present day traffic provided they were repaired sufficiently to carry the ordinary traffic of 1843. Mr. Murphy for the defendants contended that this decision ruled the present case and decided that under the words "repair," "uphold" and "amend" in these Acts the plaintiffs could not make any changes in their works which altered in any way their original construction. In my judgment this decision was confined to what the plaintiffs could not be compelled to do and does not rule the present case, which is conversant with what the plaintiffs have voluntarily done in the alleged preservation and main-

(1) [1924] A.C. 877.

tenance of their undertaking. By Sec. 144 the plaintiffs were given power to maintain, amend and uphold all works already erected under the prior Acts and sec. 204 re-enacts sec. 31 of 19 & 20 Geo. 3, c. xxxii. as to persons wilfully damaging any of the works of the said navigation.

The undertaking authorised by these Acts was carried out by canalizing the Riger Lagan, *i.e.*, by using the channel of the River Lagan where it was permanently navigable, and where it was not, by cutting a canal leading out of the river and carried on through a series of one or more locks to a lower level where it again joined the river at a point where the river again became navigable. This canalizing of a river was necessarily a very difficult and delicate engineering feat. The necessary minimum supply of water for the canal was obtained by erecting a weir of an ascertained height in the river which necessarily retained, and sent along the canal below it, all water in the river to that height, and the water over the height of the weir had free vent over the weir and down the river and away from the canal. The object was to supply the artificial portion of the canal with sufficient water for navigation and to divert, as far as possible, flood water from this portion of the canal so as to keep it navigable. This object as regards the canal leading to Lock 8 was attained by the weir at I on plaintiffs' map. Below the weir in the river there is another weir at J. of the same height as I but probably erected after the weir at I was made. This weir at J. is provided with a sluice on the south bank which helps to let off flood water, and a lead on the right bank which goes down to the Lambeg Weaving Factory and the water in this lead is controlled by another sluice. The Lambeg Weaving Factory Company control the weir at J. and are not parties to this action. Along the top of the weir at J. the owners of the Lambeg Weaving Factory have for a number of years erected at their pleasure flash boards across the top of the weir to a height of 15 inches above the crest of this weir. When there is sufficient water in the river and these boards are in position they would have the effect of of raising the water in the canal above Lock 8 by another 15 inches. It was proved by Mr. Stephen Richardson that he remembers the place for 40 years, and these boards were on top of weir J. as long as he remembers, and that for a long time Messrs. Alexander Richardson and

Ch Div. 1924

LAGAN NAVIGATION Co. v LAMBEG BLEACHING Co.

John Richardson were the owners of the defendants' premises and that the same Mr. Alexander Richardson and John Richardson and one Richard Nevin were the owners of the Lambeg Weaving Company's premises and that the field lying between the river and the canal marked on plaintiffs' map "liable to floods" was part of the Weaving Company's premises. It is suggested by the plaintiffs that the same persons were owners of the defendants' premises and part owners of the Lambeg Weaving Company's premises and that the defendants' predecessors acquiesed in the erection of these flash boards which had the effect of raising the height of the water along the canal up to Lock 8 by 15 inches permanently when in use, and that the defendants cannot now complain of the water in this reach of the canal flooding them. The defendants on the other hand contend that the plaintiffs, for the purpose of trying to make the water in this reach of the canal permanently deeper by fifteen inches, acquiesed in the erection of these flash boards as they took no action to have their use stopped, and must now be taken to have adopted their erection, and are now responsible for all the flooding whether caused by these boards or otherwise. In the absence of the Lambeg Weaving Company I am unable to ascertain whether they have a right to erect and keep these boards as against the plaintiffs and their numerous statutes, or as against the defendants. Any injury which may be caused to either plaintiffs or defendants by the erection of these flash boards can only be ascertained in an action or actions against the Lambeg Weaving Company. As regards the condition of the plaintiffs' premises on the east side of the towing path—their lands are liable to flooding from the upper lands and this corner of their lands is known as Gilmore's Moss. There is a spring in the moss at the point G. and the plaintiffs have endeavoured to separate the spring water here available, from the drainage and surface water from the surrounding lands. The drainage water so far as possible is taken down towards the canal and then parallel with it to a water hole opposite the point F. as shown on the enlargement on plaintiffs' map. There is a culvert here leading through the bank of the canal from this water hole and there is also a pipe leading from this water hole to an artificial watercourse running on defendants' lands parallel to the tow path to defendants' locks.

There are here two other channels supposed to be spring or clean water, one leading from M. to G. and the other from K. to L. on plaintiffs' map—really dams—and both connected by closed pipes with the said water course leading to defendants' premises—all these three pipes are closed at their connection with the last-mentioned water course and can be opened at will by the defendants. All these water courses are ordinarily separated from one another by banks but when Gilmore's Moss becomes flooded the banks are submerged and they all get mixed up. The actual height of these banks or of the bank between the spring water and the drainage water along its whole length has not been proved. On 18th January, 1924, Gilmore's Moss was a lake and the banks were submerged and defendants could not use the water coming from Gilmore's Moss to their premises. It was not proved to me that this flooding was caused solely by the water from the canal, or by the water from the upper lands. It was probably caused by both combined. Neither party could say what the object of the culvert through the bank of the canal was—whether to take off water from plaintiffs' lands to the canal or to take in water from the canal. The plaintiffs allege that defendants could stop all flooding through this from the canal by putting a controlled valve on it at its entrance into the canal, and the defendants refuse to do this. The level of the bottom of this culvert is 60.24 and of the top 61.76 and as soon as the level of the water in the canal rises to 60.24, water from the canal must go into this culvert, and thence into the water hole unless the water in the water hole is the same height. If the water in the water hole is 60.24 or higher it will escape into the canal unless the water in the canal is of equal height. This culvert was in my opinion made and is maintained for the convenience of the defendants' lands and not for that of the canal, and in my opinion the defendants cannot complain of any flooding to their lands from the canal caused by this culvert. Now the level of the submerged weir at I. is 60.5 and the level of the coping at Lock 8 in its original state is from 62.7 to 62.85. I cannot believe that the engineers who constructed this reach of the canal anticipated that in flood time the water in the canal would ever rise beyond the height of 62.7 and flow along and over Lock 8 and into the chamber of that lock or down to the lower reaches of the

Ch. Div. 1924

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

canal. This would turn Lock 8 into a waterfall or cascade, make it impossible to raise the water in the chamber to the same height as in the canal above Lock 8 and make navigation impossible through this lock. I do not accept the defendants' contention that Lock 8 was constructed as a vent for flood water in addition to the vent over the submerged weir at I. It seems to me utterly inconsistent with making a navigable passage from Belfast to Lough Neagh that the towing path and one of the locks should in flood time be continuously submerged, and the earth at the back of the masonry along the sides and chamber of the lock washed constantly away. It would seem to me that defendants cannot complain, if the level of the water in the canal at the point F. and in their water hole by means of the culvert at F. is raised to the height of 62.7 the level of the original coping at Lock 8. But it is said that by raising the embankments and putting in sods to an additional height of 15 inches at Lock 8 plaintiffs raised the water at F. in the canal and also through this culvert in defendants' lands to 63.95 or possibly to 64 which is the level of the towing path at F. It is also said that though the flash boards at J. weir were taken off for four days before 18th January, 1924, the flood was so great in both river and canal that the towing path (level 64) was submerged and that the canal and Gilmore's Moss were one lake and that all this was the result of raising the embankment at Lock 8 from a foot to 15 inches. At this time there was a free vent for more than two-thirds of the flood water over the weirs at I. and J. and there must have been a depth of 3.5 feet of flood water going continuously over the top of those weirs. If the height of the flood water in both river and canal on this occasion was 64—whether there was an embankment over the coping at Lock 8 or not—might not this height of flood water pass the point F. and the culvert, raising the water on defendants' lands through the culvert to this height, and then pass along to Lock 8 and send a head of water over Lock 8 of a depth of 1.5 feet if there was no embankment there and of .25 feet if the embankment of 1 foot 3 inches was there? It seems to me that having regard to the flood in the river on this occasion it is very difficult to say to what height the water at point F. and in defendants' lands would have risen even if there had been no embankment at Lock 8. The onus of proving this was

on the defendants and it has not been discharged. At the same time I am of opinion that the additional embankment made when the coping at Lock 8 was raised prevented the water when it rose above 62.7 getting away over this lock as quickly as it would have done if there had been no embankment there, and that flood water must have been kept on defendants' premises somewhat longer than it would have been if no embankment existed. The defendants have not satisfied me on the evidence that the water from the canal would not have mixed with the spring water in Gilmore's Moss even if no additional embankment above the height of the original coping had been made, but I am satisfied that the embankment had the effect of keeping water from the canal for a longer time and at a greater depth on defendants' lands than would have been the case if no additional embankment had been raised at Lock 8. Were then the defendants entitled to take the law into their own hands and remove this embankment which plaintiffs made for the protection and maintenance of Lock 8, and the navigation through it on this canal. I hold that the lands on both sides of Lock 8 on which the embankment was made were the property of the plaintiffs under the express words of Sec. 5 of 6 & 7 Vic. c. civ. as being necessary for the purposes of the navigation and being a towing path and ground on which lock houses and works belonging to the navigation are standing. The lock house on the west bank of Lock 8 is outside the limits of the embankment made and objected to. I hold that the folio and map put in evidence by the defendants cannot take the lands on the west side of Lock 8 and between the lock house and the canal out of the plaintiffs' possession. If I am wrong in this and if the defendants are the owners of the lands on the west side of the lock down to the edge of the lock chamber they own it subject to the right of the plaintiffs to use the lands for the purpose of their undertaking including the making, if otherwise legal, of the embankment complained of.

The other flooding complained of by the defendants is of the field lying between the river and the canal marked "liable to floods" on plaintiffs' map, but it is proved that this field is flooded from the river before it is flooded from the canal and any flooding thereof from the canal was not proved to be caused by any act of the plaintiffs. The right

Ch. Div. 1924

LAGAN NAVIGATION Co. v LAMBEC BLEACHING Co.

of abatement of a nuisance undoubtedly exists but it is not favoured by the law. The plaintiffs' property extends through many miles of country and is necessarily exposed and unguarded. Any interference with it may cause irreparable damage to a great public work. For this reason, as in the case of railways, provision is made making any person who wilfully breaks down or damages any works made for the use of the said navigation guilty of a criminal offence punishable by fine and possibly imprisonment, and the defendants broke down this embankment without giving any notice, and the embankment was made to protect Lock 8. Is any person, be he mill-owner, manager, farmer, labourer or other person, who conceives that he is injured by some work made by the plaintiffs for the use of this canal to be at liberty to break down the work and say I thought it was unauthorized, in the teeth of such a section.

The defendant gave plaintiffs no notice of their intention to go in and abate this nuisance. If they had given reasonable notice plaintiffs could have stopped them by issuing a writ and getting an injunction restraining the defendants pending the hearing of the action, on the usual terms. Instead of doing so they took the law into their own hands and cut away this embankment and abated the alleged nuisance to their own satisfaction. In doing so the defendants in my judgment committed what was prima facie a criminal act under the statutes, and on that ground alone the plaintiffs would be entitled to the injunction they claim. However I am further of opinion that when the plaintiffs discovered prior to 1912 that, owing to increased rain fall or more extensive drainage in the upper reaches and catchment area of the River Lagan, or to some other cause for which they were not responsible, flood water over the original level of the coping of Lock 8—62.7—came along this reach of the canal and if permitted to flow over this lock would have prevented the canal being navigable and destroyed this lock. The plaintiffs were entitled under their powers in these statutes to do the acts complained of, and preserve, uphold and amend this lock as portion of a navigable passage from Belfast to Lough Neagh; and if the acts complained of inflicted any loss on the defendants such loss must be claimed and assessed under the provision of any of these Acts and not at common law as claimed in this action.

On the conclusion of the evidence in this case I suggested a report from the able engineers who respectively represent the plaintiffs and defendants in this action as to what, apart from their legal rights would be the best method of putting an end to all flooding of the defendants' lands along this portion of the canal, and also a conference with the representatives of the Lambeg Weaving Factory, so far as the flash boards and the sluices at weir J. affect the flooding I have received their reports, and the result of the conference, and it appears that the Lambeg Weaving Co. claim the right to control the flash boards and sluices at weir J. but I understand were willing to agree that when the flood water at weir J. rose to 62.50 they would take off these flash boards and open the sluice at south of weir J. in exchange for defendants in dry weather stopping their use of water from the canal at a point not connected with this action, so as to let enough water down to weir J. and the Lambeg Weaving Company's premises for condensation purposes. The defendants agreed to this and I hope it may be carried out. Both engineers agree that this would have a beneficial effect in stopping or lessening the flooding of defendant lands along the canal. It would seem to follow from this that the use of the flash boards and sluices at weir J. has an effect on the flooding complained of in this action. The plaintiffs' engineer is of opinion that any flooding of defendants' lands through the culvert at F. could be remedied by a valve on the canal side of the culvert at F. which defendants could control, and by raising the bank on defendants' lands between the drainage water and the spring water at Gilmore's Moss by some 10 or 12 inches at a cost of £10. The defendants' engineer says that at present with open culvert at F. the water in Gilmore's Moss never can rise higher than the water in the canal but if a valve were put at canal mouth of culvert the water in Gilmore's Moss might rise higher and cause litigation with owners of lands at a higher level than defendants' lands. That the real solution is to make a weir out of the canal near to and above Lock 8 at a level of 62.50 and carried through defendants' lands to the river—and that this together with the arrangement about the weir J. and its sluices would keep or tend to keep the water along the canal past defendants' lands at the level of 62.50 even in flood times, and would be the only solution except allowing

Ch. Div. 1924

LAGAN NAVIGATION Co. v LAMBEG BLEACHING Co.

the flood water to go down over Lock 8 when above the original level of 62.7. The plaintiffs' engineer agrees that this weir near Lock 8 and the arrangement with the owners of weir J. would be a good solution.

I have from these reports come to the same conclusion I formed from the evidence in this case (1) that the flooding defendants complained of is caused by the height of the flood in the river above Lock 8 for which plaintiffs are not responsible. (2) By the action of persons not before the Court and whose rights cannot be ascertained in this action, such as the persons who control Weir J. and its sluices. (3) To some extent by the embankment complained of at Lock 8. (4) That flood water must continue to go over Lock 8 to its injury, and the stoppage of the canal as a means of passage for navigation during floods, and possibly altogether, unless the embankment complained of was allowed to preserve this portion of the canal; or a weir was erected as suggested near Lock 8 to carry off the flood water through lands on which the plaintiffs have no right to enter.

It would also seem evident that whatever flood water would be carried off by the suggested weir must first pass defendants' lands at the culvert at F. and flood them to whatever might be the height of the flood water at the time. The plaintiffs not having any power to erect the suggested weir, have by raising the embankment done the only thing possible to maintain their undertaking, and this was within their powers and the defendants have no right to enter on plaintiffs' undertaking and wilfully to break down or cut through this embankment. I must grant the plaintiffs the injunction asked for and fix damages at £20, as plaintiffs are satisfied with that amount, in lieu of an inquiry, and I order the defendants to pay the said damgaes and the costs of this action when taxed and ascertained, to the plaintiffs. As to the defendants' counter-claim I must dismiss it with costs, to be paid to plaintiffs when taxed and ascertained, both on the ground that the plaintiffs were entitled as aforesaid to do the acts complained of, and that the sections re-

ferred to made the acts of the defendants illegal in any case, and on the further ground that if the plaintiffs were not so entitled the defendants by abating the said alleged nuisance themselves were not at liberty to bring any action in respect of said nuisance against the plaintiffs (*Baten's Case* 9, Co. Rep. 53b).

The defendants appealed to the Court of Appeal (1).





*Babington K.C.*, *Murphy K.C.*, and *Black* for the appellants:—

When the undertaking was handed over to us in 1843 the rights of the Lagan Navigation Company were stereotyped, and they cannot in law make alterations which would have the effect of interfering with the rights of adjoining owners. The plaintiffs, in or about 1912, made an alteration in the level of the lock. They raised the coping all round its perimeter to a height varying from thirteen to eighteen inches. The whole question in the present action is whether the banks behind the coping should be removed or not. The portion of the canal involved is really on the same footing as a canalized river. We submit that if there is an appreciable interference with our rights we are entitled to an injunction. The question is, what are the rights of the Lagan Navigation Company? No power to alter the whole construction of the works was given to them by their statutes. The undertaking must be maintained substantially in the way in which it was at the time of the original construction, and the rights of adjoining owners who were using the canal must be protected.

The effect of 54 Geo. 3, c. ccxxxi. was that the undertaking was to be improved, and that after a period of twelve years it was stereotyped, and any further improvements would require Parliamentary sanction. In 1843 power was given by 6 & 7 Vict. c. civ. to lay out certain money in improvements. Section 144 of this Act, we sub-

(1) In the Court of Appeal before Moore and Andrews, L.JJ.

C. A. 1925

LAGAN NAVIGATION CO. v. LAMBEG BLEACHING CO.

mit, only gave power to maintain works that were taken over, and works authorized to be executed by the statute. There is no provision in this statute which would give a person whose lands were not taken over, but were injuriously affected a right to compensation. As to the effect of s. 204 of 6 & 7 Vict. c. civ. we submit that a thing is not done maliciously when done in exercise of a bona fide right, and that the defendants could not have been convicted. We contend that s. 204 is no answer to our claim to have a right to abate the nuisance, and that *Baten's Case* (1), cited by Wilson J. on that point, is not material.

As to the question of the rights of the Lagan Navigation Company we rely on *Stourbridge Canal Company* v. *Wheeley* (2) and especially on the following passage from the judgment of Lord Tenterden CJ. at p. 793: "The canal having been made under the provisions of an Act of Parliament, the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and, the plaintiffs can claim nothing which is not clearly given to them by the Act."

We rely strongly also on *Glamorganshire Canal Navigation* v. *Blakemore* (3). The words used by Lord Eldon in *Blakemore* v. *The Glamorganshire Canal Navigation* at p. 162 (4) where he says "When I look upon these (Local) Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in any thing to be done under them," are very material to the present case. *Nield* v. *The London and North Western Railway* (5) closely resembles the present case. *Whalley* v. *The Lancashire and Yorkshire Railway*

(1) 9 Coke's Rep. 53 b. (3) Clarke & Finnelly 262
(2) B. and Ad. 792 (4) 1 My. and K. 154
(5) L.R. 10 Ex. 4

*Company* (1) decided that where water has got on to the land of one party, that party is not entitled to discharge it to another party's land. *Greenock Corporation* v. *Caledonian Railway* (2) decided that an extraordinary rainfall was not a damnum fatale.

The law on the subject of the abatement of a nuisance is well settled, *Penruddock's Case* (3), *Jones* v. *Williams* (4), *Lemmon* v. *Webb* (5). See the judgment of Lindley LJ. at page 13 where he says : " Jones v. Williams was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance and non-compliance with that request are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it."

We submit that this work was not necessary for the purpose of maintaining the navigation *Richard Evans, jun.* v. *Lord Delamere* (6).

The plaintiffs have no power to improve their works. *Gerrard* v. *Crowe* (7) does not come within the principle that we are contending for here. *Cracknell* v. *The Mayor and Corporation of Thetford* (8) has no application to the present case. In *Emsley* v. *North Eastern Railway Company* (9) there was power under the statute to alter, repair, or discontinue the works and substitute other works.

The learned judge has found that we were injured and that the doing of the work was in breach of the plaintiffs' statutory duties. There is no authority for any overriding right and the plaintiffs are confined to the powers specifically conferred on them.

(1) 12 Q.B.D. 131
(2) [1917] A.C. 556
(3) 5 Co. Rep. 100 b
(4) 11 M. and W. 176
(5) [1894] 3 Ch. 1
(6) 13 W.R. 757
(7) [1921] 1 A.C. 395
(8) L. R. 4 C.P. 629
(9) [1896] 1 Ch. 418

C. A. 1925

LAGAN NAVIGATION Co. v. LAMBEG BLEACHING Co.

[They also referred to *Stollmeyer* v. *Trinidad Lake Petroleum Company Limited* (1), *Attorney-General for Ireland* v. *Lagan Navigation Company* (2), *Canadian Pacific Railway Company* v. *Parke* (3), Coulson & Forbes Law of Waters (4th edition), p. 665 (Abatement of private nuisances.)]

*Megaw K.C.*, *Pringle K.C.*, and *Warnock* for the respondents:—

We do not admit that the flooding was caused by any acts of the plaintiffs. We contend that under the statutes we have the right and duty to bring water into the canal and to make such alterations and amendments as are reasonably necessary for the navigation. That the alterations complained of were reasonable is borne out by the evidence and by the finding of Wilson J. The plaintiffs have ample power under their statutes to execute such ancillary work as will keep the canal reasonably fit for the purpose for which it was created, 54 Geo. 2., c. ccxxxi., s. 2. Section 5 of 6 & 7 Vict. c. civ. gives the plaintiffs ample authority to do what they have done. Section 95 of this Act makes provision for settling cases of disputed compensation. Section 144 authorises the company to execute new works. Under this statute the plaintiffs are entitled to amend and keep their works reasonably safe.

*Emsley v. North Eastern Railway Company* (4) is we maintain a complete answer to the argument that the construction of the canal was stereotyped. The paramount purpose of these Acts is the maintaining the navigation of the River Lagan. We deny that we have flooded the defendants, but submit that we are entitled to do so, if necessary for the navigation *Gerrard* v. *Crowe* (5) *Glamorganshire Canal* v. *Blakemore* (6) differs essentially from the present case, as in that case there was a statutory right to water.

On the question of abatement of nuisance, there is ample justification for the finding of Wilson J. and for the course that he took on this point. The plaintiffs here

(1) [1918] A C. 485 (3) [1899] A.C. 535 (5) [1921] 1 A.C. 395
(2) [1924] A.C. 877 (4) [1896] 1 Ch. 418 (6) 1 Cl. and Fin. 262.

do not need to have the canal deepened at all. The defendants might have alleviated the flooding in a number of ways, they might have opened the sluices on their own land. The Lagan Navigation Company is not bound to allow the Lagan to become a waterway. The plaintiffs have discharged their statutory duties. Here is a company incorporated for the purpose of navigation. They have nothing but navigation to look to and are entitled to amend their banks even if the result is to flood adjoining lands *Cracknell* v. *The Mayor and Corporation of Thetford* (1). Under s. 62 of the 6 & 7 Vict., c. 104, which is the paramount section, the plaintiffs are compelled to maintain the works of the navigation. They only claim to amend and improve so far as is necessary to carry out the functions entrusted to them by their Acts. The power of amendment which has been given to them by Act of Parliament is not consistent with the claim that the construction of the canal was stereotyped. It would be beyond the power of the plaintiffs to grant any rights which would hinder the navigation.

We submit that the judgment of Wilson J. was right and should be affirmed.

*Cur. adv. vult.*

MOORE C.J.: This case occupied a considerable time before us, but, as the facts are not in dispute, they can be very shortly stated.

The history of the case begins with the Lagan Navigation Act, 54 Geo. 3, c. ccxxxi., passed on July 29th 1814.

The navigation was then to some extent in general use, along a river canalized in parts, and this statute authorised further improvements. By sec. 2 the undertakers were inter alia empowered "to separate part of the said Lagan navigation between the eighth and ninth locks thereof from the said River Lagan by carrying the said navigation through certain lands in the townland of Tullynacross in the Parish of Lambeg in the County of Down."

(1) L.R. 4 C.P. 629.

C. A. 1925

LAGAN NAVIGATION Co. v. LAMBEG BLEACHING Co.

The effect of this was to treat the river as an inverted U and to join the limbs by a canalized cut across. The canal was made accordingly, terminating in the eighth lock, and the water to supply the canal and the lock and chamber was obtained by building a weir across the river at a point where the canal left it for the lock, and kept at a level I call X. This Act continued in force for twenty-one years.

The next Act, 6 & 7 Vict., c. civ., passed 22nd August, 1843, transferred the undertaking to a new corporation (Sec. 2) with all the estate and also the powers formerly owned or exercised by the previous undertakers. They carried on the undertaking in the same manner as their predecessors, keeping the water in the canal and lock at the level X. until the year 1911, without apparently any injury to any person.

The defendants are adjoining owners of lands along the canal and carry on a business to which it is admitted flood water is highly detrimental. In the year 1911 or 1912, the plaintiffs began to make alterations in the working of the navigation, directed to raise the level in the canal and in the lock chamber by 15 inches above the existing level X. They did this by putting additional boards across the top of the lock gates where the canal entered it; and also by raising the side walls of the lock chamber by building along them a stone coping backed up with earthen banks. This raised the level of the water in the canal by 15 inches above X. In ordinary times the plaintiffs got a greater amount of water into the chamber, for of course it would hold more, but in times of flood the water was backed up against the lock gate to an additional height of 15 inches, and so was thrown back to the weir, which prevented the surplus water so accumulated from being discharged with enough speed, and the water overflowed through and under a syphon culvert in the canal bank on to defendants' lands and injured them.

This began in 1912, but owing to the war and other causes, the conflict between the parties was not fully entered upon until 1920, and it is agreed that this delay, which was a mutual one, is not to be taken into account as against either of the parties.

account as against either of the parties.

After a lengthy correspondence there finally came a flood; the lock filled to overflowing; the water could not get away; the canal was equally raised above normal, and

the defendants' lands were flooded. The defendants by their servants entered on the plaintiffs' lands at the lock and cut through the earthern banks at each side of the lock (the additional stone coping having been previously removed), and suffered the water to escape along the ground at the side of the lock, thereby reducing the flood height almost immediately and saving themselves.

The plaintiffs replaced the earthern banks and claim an injunction to restrain the defendants from further interference with their banks. The defendants have counterclaimed for (1) An injunction to restrain the plaintiff company their servants and agents from erecting or maintaining the said mounds or any part thereof or any similar mounds or other device calculated to raise the level of the water in the part of the Lagan Canal or River Lagan above Number 8 Lock or to cause flooding of the said lands of the defendants. (2) A mandatory injunction to compel the plaintiff company to remove the said mounds forthwith. (3) An injunction to restrain the plaintiff company their servants and agents from placing or maintaining boards on the top of or raising the height of the gates of the said lock. (4) Damages.

The defendants have strongly pressed us with the argument that the raising of the height of the lock gates and of the sides of the lock chamber was not in accordance with the original plans deposited under the Act of 1814 and was therefore ultra vires. We have not seen the plans so deposited but it is argued fairly enough that it must be assumed that the status quo ante 1912 was the status originally created in accordance with those plans. Mr. Babington has contended that the works, as originally carried out, stereotyped the powers of the undertakers in that respect and could not subsequently be altered without further statutory powers. I do not think that this contention is sound. I can find no express enactment in the plaintiffs' Acts supporting this view; I do find a general power to do what was necessary and reasonable for the purposes which they were charged to carry out, viz., the navigation, and I also find an express power of repairing and amending to which I will afterwards refer.

The defendants' case really rests on a different footing. It depends, not on wrongs flowing from an unauthorized

C. A. 1925

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

exercise of power by the plaintiffs, but on misuse of powers which give the plaintiffs authority to conduct the navigation. I think the law in Ireland is explicitly and fully laid down for us in the judgments of Lord O'Brien and of Palles C.B., in *Bligh* v. *Rathangan Drainage Board* (1), where they apply the House of Lords decision in *Geddis* v. *Bann River Reservoir* (2).

The Chief Baron says at page 222 that the judgments in the House of Lords "establish two propositions in the "clearest language: first, that ic a statute authorizes an "interference with a previously existing right of an in- "dividual, the negligent exercise of the powers so con- "ferred gives a cause of action, and is not justified by "the statute—that the justification afforded by the statute "is for the due, reasonable, and careful—not for the "negligent—exercise of the powers. Secondly, as to what "is negligence—that where you have the power, by the "exercise of the rights you possess under the Act of Par- "liament, to do an act in such a way that it will not cause "injury, then the doing it in a way that does cause injury "is an actionable wrong, because it is not justified by the "statute."

He had previously stated that the only question in the case was whether the flooding of the land which was prima facie a trespass to the common law right of the plaintiff not to be flooded, was justifiable under the statute, or in other words was justified thereby.

I therefore hold that it lies on the plaintiffs to show, that, having flooded the defendants' land by reason of the alterations they caused to be made in the level of the water, they were justified in so doing under any authority in their Act.

This authority is claimed for them under Sec. 144 of the Act of 6 & 7 Vic., c. civ., which provides as follows:— "They may repair, maintain, amend, and uphold all such "works and other things as have already been erected, "made or done under or by virtue of the hereinbefore "recited Acts, or any of them."

In my judgment, this does not release the company, in the exercise of their powers, from liability for damage

(1) [1898] 2 Ir. R. 205 (2) 3 App. Cas. 430

caused to an adjoining owner if they choose to exercise their powers without due care and precaution for his interests.

Here the original construction had existed without injury to any one for probably seventy years. The plaintiffs in the exercise of their powers raise the level X by 15 inches. At the same time they admit by their counsel that in times of flood they have no means of discharging the additional weight of water thereby collected, so that in consequence some of it must find its way into the defendants' land. I hold they are not justified in this, following Lord O'Brien in *Bligh* v. *Rathangan Drainage Board* (1) " If by a reasonable exercise of their powers under the statute they could have prevented the damage complained of . . . they are responsible."

Mr. Megaw, however, has argued that the statute directs and empowers the company to carry on the navigation and suggests that, if they find it neccessary for the navigation to make these additions and alterations, they are not liable for the consequences even if they involve the flooding of the defendants' land. He merely says that cannot be helped; it has become a necessary incident to the exercise of the company's statutory powers as authorized by Parliament. In so saying, he is attempting to apply the reasoning of Lord Cairns in *Hammersmith Railway Company* v. *Brand* (2).

In that case the owner of a house complained of the damage caused to his house by the vibration arising from the passage of trains running under statutory powers on the defendants' railway. Lord Cairns said that railways could not be used without vibration and it must be taken that when Parliament authorized the use of a railway, that it thereby recognised that there must be vibration, and that for any Court to interfere by way of prevention of such vibration, and so to prevent the railway being worked would be to defeat the very purpose of the Act.

The passage containing this view was quoted by Halsbury C., in *Canadian Pacific Company* v. *Roy* (3), but he proceeds : " This (statutory) permission of course does not " authorize the thing to be done negligently or even un-

(1) [1898] 2 I.R. 205 at p 214 (2) L.R. 4 H.L at p 215
(3) [1902] A.C. at p 230

C. A. 1925

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

"necessarily to cause damage to others." It is quite plain to the ordinary mind that, though a railway cannot be used without vibration, yet a canal can be used without flooding, as happened in the present case for the long period prior to 1912. In *Laurence* v. *Great Northern Railway Company* (1) the railway company in conformity with their Act carried their railway along an embankment across low lying land. The Act did not require the railway company to make flood openings in their embankment. The plaintiffs' lands were flooded. The judgment of the Queen's Bench was delivered by Patteson J. Having stated that the Act did not compel the company to make openings for flood waters, and that they were therefore not compellable to do so, he proceeds: "The company "may have been at liberty under the Act to construct "their railway across the low lands in the manner they "have done, but it does not follow that, in case an un-"forseen injury arises to any one from the mode in which "it is constructed, they are not liable to an action." That case dealing with construction and not merely user is a very strong authority against the plaintiffs. On this branch of the case I think that the plaintiffs were guilty of negligence in the legal sense towards the defendants, in not providing reasonable means of discharge for the additional water they accumulated in the canal, and that inasmuch as this was not a reasonable result of the exercise by them of their statutory powers, they can not justify under the statute.

It was then suggested that no action would lie on part of the defendants inasmuch as the Act provided for compensation for injury by its own code on lines somewhat analogus to the Lands Clauses Act, and that this constituted the defendants' only remedy. I will answer this briefly by an extract from the judgment of Palles C.B., in *Bligh* v. *Rathangan Drainage Board* (2), to which I have already referred: "But damage which is caused by the negligent maintenance by the defendants of their authorized works in a state calculated to cause unnecessary damage does not reasonably result from the authorized works. For it redress cannot be obtained under the

(1) 16 Q.B. 643 (2) [1898] 2 I.R. 205 at p 219

compensation clauses, and for it an action lies, as the justification afforded by the statute does not extend to it. I have never heard this position doubted. The only contention which I have ever heard raised in such cases is whether the act or omission of the defendants relied on by the plaintiff, is in law a negligent one, or, in other words, one as to which the defendants owed a duty to the plaintiff."

The question of how far the defendants were at law entitled to abate the nuisance by cutting down the earthern banks to save their lands from being flooded was not really argued on the appeal. Nor do I think it could have been, considering the cases from *Davies* v. *Williams* (1) down to *Lemmon* v. *Webb* (2), and it is recognised that a man after notice can trespass on his neighbour's land to abate a nuisance causing injury to himself. But counsel have laid stress upon the special provisions of the Act of 6 & 7 Vict. c. civ., Sec. 204, and the learned judge has twice referred to this Section in his judgment. The Section runs thus :—

"And if any person shall wilfully and maliciously break down or damage, or cause to be broken down or damaged, any of the works already made or which shall be made for the use of the said navigation, every such person so offending, and being thereof convicted upon information or indictment, shall forfeit to the company treble the sum necessary to be laid out in repairing such damage, which sum shall be ascertained by the jury who shall try such offence, and the judge before whom such offence shall be tried shall commit such offender to the common gaol till he shall pay to the said company the sum or sums so ascertained; and in any indictment such offence shall be laid in the county in which the same happened."

I cannot see that this presents much difficulty in the circumstances of the present case. If the acts complained of were malicious they were unlawful. But the defendants have shown clearly that these acts were done by them with full legal justification in order to abate an active nuisance, and were therefore lawful. If the acts were lawful, they cannot at the same moment be malicious.

In my opinion Wilson J's order should be reversed, and the action dismissed with costs. The defendants are entitled to succeed on their counter-claim.

Andrews LJ. and I are agreed that there should be an injunction to restrain flooding and a mandatory injunction to remove the earthen banks, but we will settle the precise

(1) 16 Q.B. 546 (2) [1895] A.C. 1

C. A. 1925

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

form with the registrar, who will show counsel the draft order for their observations.

Mr. Black for the defendants has accepted £5 for damages and waived an inquiry.

ANDREWS LJ.: I do not find it necessary for the purposes of my judgment to refer to more than a few of the principal facts set forth in the very full and careful note of the evidence taken by Mr. Justice Wilson.

When the canal was cut from the bend in the River Lagan near the point marked "I" on Mr. Swiney's map to and past Lock 8 a weir was constructed at the point "I" of a height of 60.5 above datum with the object of diverting and embanking sufficient water in the new cut to make it navigable.

The level at Lock 8 was determined by the coping and may be taken as 62.7, *i.e.*, almost $2\frac{1}{4}$ feet higher than the crest of the weir at "I." If the water in time of flood reached the level of 62.7 it necessarily flowed over the side of the lock, and this, it is alleged, interfered both with the stability of the structure and also with navigation. There is evidence to show that this flooding occurred with some frequency; and I have no doubt that it must in a large measure be attributable to the fact that the top of the weir at "J," which is a little lower down the river than "I," was at some date, more remote than could be deposed to by any of the witnesses at the trial, raised from the mean height of 60.5, at which it was originally fixed in common with "I," by the erection of flashboards, which, when in raised position, stand some 15 inches higher than the crest of the stone weir. No doubt there are sluices at or near weir "J," but these are apparently inadequate for the purpose of venting storm water as rapidly as it comes down the river; and the natural effect of these flashboards when in position is, except, perhaps, in time of drought, to raise the normal level of the water in the reach of the canal to Lock 8 to an extent of 15 inches. It was probably this circumstance which largely accounted for the action of the plaintiffs, when, in 1912, they employed a bricklayer named Hugh Adams, who stated in his evidence that he raised the coping along the lock by from 12 to 14 inches, and that

he afterwards filled in the banks which were previously level with the old coping so as to correspond in height with the new coping. At the same time two new lower gates were fitted 14 inches higher than the old gates. The level of the top of the new coping became thus approximately 64, a figure of great significance, as it is when the water reaches this height that it flows over the banks of the stream in the defendants' premises.

To this action of the plaintiffs exception was immediately taken by the defendants. The plaintiffs replied by letter of 2nd September, 1912, that they had made no alteration in the upper gates which, they contended, governed the height of No. 8 level, and that there had not been the slightest alteration of any other kind which would affect the height of that level. The correspondence thus commenced was dropped and was not resumed until 1919. Interviews followed, and ultimately, in January and February, 1921, the new coping was removed, and the long gates at Lock 8 were also lowered without prejudice to the plaintiffs' rights. The defendants still complained, however, that the additions which were made to the banks at the back of the coping at the time it was raised had not been removed. The plaintiffs' replies were somewhat evasive. As they contended, however, that they had carried out their undertaking to restore the lock to its original condition, it must be taken that they maintained that the banks behind the coping had not been raised. This was the case that they subsequently endeavoured, but failed, to make before Wilson J. The finding of the learned judge that the banks had been raised was in my opinion obviously correct, and has not been challenged before us.

In January, 1924, flooding on the defendants' premises recurred. I am of opinion that this flooding was in a large measure caused by the raised banks at Lock 8, which increased the level of the water in the canal and caused the water to flow through the culvert at such a level as to overflow the banks of the stream or back drain on the defendants' premises.

The defendants had failed by correspondence to have the lock banks lowered, so, in the sudden emergency

C. A. 1925

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

which had arisen, they took the law into their own hands, cut away portion of these banks, and abated the nuisance. The plaintiffs immediately restored the banks, and the next day the defendants again cut them away. Once again they were restored by the plaintiffs, who thereupon issued their writ of summons claiming an injunction and damages. In their defence the defendants justified their acts, submitting that they were necessary for the purpose of abating a nuisance which had been caused by the plaintiffs raising the lock banks, and they counter-claimed for an injunction and damages. To this the plaintiffs replied that they were entitled to maintain the banks at the level complained of; and they further submitted that in law the defendants had no right to abate the alleged nuisance. They also maintained before us that, if the defendants were entitled to any relief, this could only be obtained under the compensation sections of the plaintiffs' private Acts of Parliament. I shall examine these legal submissions separately.

When called upon by the defendants to give particulars of their authority to maintain the banks at the level to which they had been raised, the plaintiffs claimed to do so by virtue of their common law rights and also by virtue of the provisions of the Statutes 54 Geo. 3, c. ccxxxi., and 6 & 7 Vict. c. civ. Subsequently, by amended particulars, they claimed the right also under the Prescription Act, 1832 (2 & 3 Wm. 4 c. 71).

Now it is obvious that the plaintiffs as owners of land have no common law right so to use it as to cause injury to their neighbours. The canal was artificially constructed and the water was brought there by the plaintiffs. In these circumstances they cannot at common law justify the flooding of other persons lands by merely proving that, had they not acted as they did, their own premises would have been flooded. The claim under the Prescription Act also fails by reason of the insufficient lapse of time since the construction of the works complained of.

The principal arguments addressed to us were, therefore, upon the provisions of the plaintiffs' private Acts of 54 Geo. 3, c. cxxxi., and 6 & 7 Vict., c. civ. Section 2 of the former Act expressly

authorizes the company to separate part of the Lagan navigation between the 8th and 9th Locks by carrying the same through certain specified lands and by diverting the River Lagan. It further empowers the company to repair, maintain, amend and uphold all such works and other things as have already been erected, made or done under or by virtue of the Acts therein recited, and also to make all such works as should be requisite and convenient for making, completing and maintaining the canals and navigation; and it also provides that the said powers should be used and put in execution for making, completing, preserving and maintaining the canals and works, and also for making and performing all such other works as the Company should think necessary and expedient for the benefit of the said canals, improvements and other works.

By 6 & 7 Vict. c. civ. the present plaintiffs, the Lagan Navigation Company, were incorporated. Section 2, in addition to vesting the property in the new company, continued powers of the late company in their favour. Section 5 further provided that the company should have the power, right and privilege of coming in and upon the adjoining lands on each side of the navigation for the purpose of repairing and amending the banks, and for all or any other purposes whatsoever that might be necessary for the preservation and repair of the said navigation, doing as little damage as possible, and making compensation for same in manner directed.

The Acts contain other sections not irrelevant to the present issue; but I have cited sufficient to justify the opinion I have formed that it was and is competent for the company from time to time to amend the construction of their locks and works. In this respect I am in entire agreement with Mr. Justice Wilson. But it is equally clear that this does not absolve them from liability to the plaintiffs if the work so executed was negligently performed and if damage was caused to the plaintiffs thereby. It was never intended by the legislature that the wide powers conferred on the plaintiffs should be exercised without any regard for the rights of property possessed by adjoining landowners. In performing their duty in the

C. A. 1925

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

interests of navigation it is incumbent on them to have due regard to the rights and interests of those whose lands adjoin the canal, and who may be injured by the execution of such works. In *Weld* v. *The Gaslight Company* (1), Lord Ellenborough briefly expressed the principle:— "A company having under an Act of Parliament powers the execution of which might occasion mischief, was bound to take especial precautions against the mischief, and in default of doing so was responsible in damages." The law was fully considered by the House of Lords in *Geddis* v. *Proprietors of Bann Reservoir* (2). "If a company," says Lord Hatherley at p 438, "in the position of the defendants there has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done, must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act and with the proper execution of those powers." Lord Selborne gave expression to the same principle at page 452. "It appears to me to be clear," he said, "that if, by this Act of Parliament, power is given to the defendants to convey by this particular channel to the River Bann, a supply of water which would not otherwise in the same manner naturally pass down that channel, and to do all things proper and necessary for the conveyance and regulation of such supply of water, that power does not enable or authorize them to flood the lands of the neighbouring proprietors, unless it would be impossible to avoid or prevent such flooding by any reasonable and proper use of their statutory powers." I cite one further passage from the speech of Lord Blackburn at pp. 455/6: "For I take it," he says, "without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion

(1) Stark, 189 (2) 3 A.C. 430.

damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule 'negligence' not to make such reasonable exercise of their powers."

Numerous cases could be cited to the like effect. In *Harrison v. Great Northern Railway Company* (1) the company acting under its statutory powers was held liable for negligence in the making and maintaining of a bank. On the other hand, in *Boughton* v. *Midland Great Western Railway Company* (2) the company who caused injury to the plaintiff in the exercise of its statutory powers, was held not to be responsible as there was no evidence of negligence. The judgment of Cockburn C.J. in *Vaughan* v. *Taff Vale Railway Company* (3), and of Blackburn J. in *Jones* v. *Festiniog Railway Company* (4) might also be referred to, but it is needless to do so as *Geddis* v. *Bann Reservoir Company* (5) is a case of the highest authority. The sole question to be determined appears to me to be whether the plaintiffs, who, as I hold, acted within their statutory powers, were guilty of negligence in the execution of the works complained of. If, as Lord Blackburn puts it in the passage already cited, the plaintiffs could by the reasonable exercise of their statutory or common law powers have prevented the damage it is negligence for them not to have done so. Is there any evidence of this character in the present case? Assuming, though not deciding, that there is a necessity for the retention of the earth bank, I think the clearest evidence of negligence is to be found in the last sentence of Mr. Calwell's evidence in which he says: "If the flood escaped at Lock 8 there would be no flooding on defendants' premises." Mr. Justice Wilson seems to have thought that as it was necessary for the plaintiffs to make the canal a navigable channel and for that purpose to prevent flood water flowing over the banks of Lock 8 and injuring it, this could only

(1) 3 H. & C. 231 (3) 5 H. & N. 679 (5) 3 A.C. 430
(2) I.R. 7 C.L. 169 (4) L.R. 3 Q.B. 733

C. A. 1925

LAGAN NAVIGATION CO. v LAMBEG BLEACHING CO.

be done by raising the coping and banks of the lock. More than once, however, in argument the plaintiffs' counsel repudiated the suggestion that there was any necessity for them to raise the level of the water in the canal to make it navigable. The fact is that by allowing the weir at "J" to be raised by the addition of flashboards they retain a substantial additional volume of water in the canal, especially in times of flood. I express no opinion whatever as to whether they have now any right to compel the removal of these additions to weir "J," as the proper parties are not before the Court; but, even if they no longer have any such right, they cannot rely upon their own failure to assert and maintain their rights at the proper time as a justification for their flooding the defendants' premises. I am further of opinion, and in this I agree with the view expressed by Mr. Calwell in the joint report of the engineers furnished to the learned judge and referred to by him in his judgment, that the real solution of the difficulty would be to make a weir of a suitable level near to or above Lock 8. Mr. Swiney, the plaintiffs' engineer, agrees that such a weir and an arrangement with the owners of weir "J" would be a good solution. Much the same result could also be achieved by the construction of sluices or other adequate storm overflows of the type with which one is familiar in all canals. Suffice it to say without further consideration of the matter, the plaintiffs could have taken reasonable precautions which they did not take, to prevent the defendants' premises being flooded and their failure to do so was negligence, the existence of which constitutes a complete answer to their contention that all that they did was done under statutory authority.

The plaintiffs' next submission was, as already indicated, that, whatever be their rights as regards the maintenance of the raised banks, the defendants had no right to take the law into their own hands and to enter and abate the nuisance. The cases cited by Mr. Murphy are conclusive authority that, apart from any special statutory provision to the contrary such contention could not be upheld. It is, however, urged, and Mr. Justice Wilson

has so held, that such provision is to be found in Section 31 of 19 & 20 Geo. 3, c. xxxii., and in Section 204 of 6 & 7 Vict. c. civ., which make it a criminal offence wilfully and maliciously to break down or damage any of the works made for the use of navigation of the canal; and it is urged that there can be no right to commit a criminal act. It will be observed, however, that to bring the damage within the sections referred to it must be malicious as well as wilful, a fact which is apparently overlooked by Mr. Justice Wilson in his judgment; and, as the act was committed by the defendants in the bona fide assertion of a legal right, it is clear that it was not malicious. From many decided cases on the point I select the well known passage of Brett J. (afterwards Lord Esher) in *R* v. *Matthews* (1), where he said:—"I think that the act charged must be done not only wilfully, but maliciously, that is to say, with a wicked mind, and if it is done under a bona fide claim of right it is not done maliciously according to our criminal law."

The remaining contention of the plaintiffs was that defendants' rights, if any, are to compensation under the special Acts and not to an injunction or damages by action. In my opinion this view cannot be sustained, for the damage of which the defendants complain has, as above indicated, been caused, not by the legitimate exercise of the plaintiffs' powers under their Acts, but by a tortious and negligent act, in respect of which the defendants can only receive adequate redress by action in which both an injunction and damages can be granted. The justification afforded by the Statute under which compensation can be recovered does not extend to negligence. See judgment of Palles CB., in *Bligh* v. *Rathangan Drainage Board* (2).

Mr. Justice Wilson also held that the defendants could not succeed in their claim as they had, whether lawfully or unlawfully, abated the nuisance themselves, and that they were therefore not at liberty to bring any action in respect of it (*Baten's Case*, 9 Co. Rep. 53 (b)). In my opinion this principle does not apply to the present case, for it appears from the evidence of Hugh Adams that plaintiffs restored the banks to the level to which they were raised in

(1) 14 Cox C.C. 5 (2) [1898] 2 I.R. 205 at p 219

C. A. 1925

LAGAN NAVIGATION Co. v LAMBEG BLEACHING Co.

1912 after the nuisance had been twice abated; and in respect of at least this last wrongful act the defendants are entitled to maintain their counterclaim.

For these reasons the judgment of Mr. Justice Wilson must be set aside and the plaintiffs' action dismissed with costs. On their counterclaim the defendants are entitled to an injunction restraining the plaintiffs, their servants and agents from raising or maintaining the coping or other works at or near Lock 8 above the level of the coping as it existed in 1912, so as to cause flooding on the lands of the defendants. The defendants will also have a mandatory injunction to compel the plaintiffs forthwith to remove such parts of the said banks of earth or mounds as may be necessary to prevent flooding by the plaintiffs of the defendants' lands. The defendants are also entitled to an inquiry as to damages if they press for it, and I agree with my colleague's direction in reference to this. The defendants will also have the costs of their counterclaim

The Order of the Court provided that the judgment of the 24th day of March, 1925, be and the same is hereby reversed, and that the said action be dismissed, with costs and costs of this appeal, to be taxed by the Taxing Master and paid by the plaintiffs to the defendants and declared the defendants entitled to judgment on their counterclaim with costs and costs of the appeal, to be taxed and paid to them by the plaintiffs, and accordingly ordered that the plaintiffs, their servants and agents, be and they were thereby restrained from raising or maintaining the coping of Lock 8, or the banks of plaintiffs' canal adjoining the said lock, to or at any height above the level of the top of the coping as it existed in and prior to 1912, so as to cause flooding of the defendants' lands adjoining the said canal. And it was further ordered that the plaintiffs do forthwith remove so much of the earthen banks or mounds adjoining said Lock 8 as might be necessary to prevent flooding by the plaintiffs of the defendants' lands adjoining the said canal.

Solicitor for the appellants: *Robert Wallace.*

Solicitors for the respondents: *White, M'Millan and Wheeler.*

J. McC.

Ch. Div.
1925
Nov. 24

## In re THE CLONARD BRICK AND ESTATE COMPANY, LIMITED (1).

(1925. No. 225.)

*Practice—Company—Dissolved Company—Application to restore to register—Companies (Reconstitution of Records) Act (Northern Ireland) 13 & 14 Geo. 5, N.I., c. 6.*

A company, which failed to comply with the provisions of the Companies (Reconstitution of Records) Act (Northern Ireland), 1923, and was thereupon dissolved in accordance with the provisions of the statute, may be "replaced on" and "restored to" the Register of Joint Stock Companies in accordance with the provisions of Sect. 5, s.-s. 4. "Replaced" and "restored" are to be read as "placed," implying a first registration of the company in Northern Ireland.

PETITION by Mary Hannah Stevenson, John Hamilton Stevenson and William James Hamilton Stevenson praying that the Court should order that the Clonard Brick and Estate Company, a company dissolved for failure to comply with the provisions of the Companies (Reconstitution of Records) Act (Northern Ireland), 1923, sect. (1), subsection (2), should be replaced on the Register of Companies, and that such directions should be given and such provisions made as might seem just for placing the dissolved company and the petitioners as nearly as might be in the same postion as if the dissolved company had remained registered from the date of its original registration, or that such other order might be made in the premises as to the Court might seem meet.

The petitioners were judgment creditors of the company. The following facts were stated in the petition. On the 3rd February, 1925, the petitioners obtained a judgment for the sum of £1,730 7s 6d and £7 15s 3d for costs against the company and on the 12th February, 1925, they registered their judgment as a mortgage against the company's interest in certain lands situate on the Springfield Road, Belfast. By order dated the 16th March, 1925, the mortgage was declared well charged on the lands and a sale was directed. By the Companies (Reconstitution of Records) Act (Northern Ireland), 1923, the company was bound to

(1) In the Chancery Division before Wilson J.

Ch. Div.

In *re* Clonard Brick Co.

furnish to the Registrar of Companies within a time limited by the said Act, a statement of particulars of the company, together with copies of the company's Memorandum and Articles of Association and other documents specified in the said Act. Section (5), sub-section (3) of the Act provides that a company failing to furnish the said statement and documents on or before the 31st March, 1925, shall be dissolved from and after that day. The defendant company failed to furnish such a statement or documents to the Registrar on or before the 31st March, 1925, and by reason of such failure was dissolved from and after that date. By reason of this it became impossible to carry out the order for the sale of the company's property.

Under section (5), sub-section (4) of the Act of 1923 "A dissolved company, or any former member or creditor thereof, may apply to the court to have the dissolved company replaced on the register, and the court may order that the name of the dissolved company be restored to the register, and thereupon the dissolved company shall be deemed to have continued in existence from the date of its original registration.

And the court may by any such order give such directions and make such provision as seem just for placing the dissolved company and all other persons as nearly as may be in the same position as if the dissolved company had remained registered from the date of its original registration."

The Registrar of Joint Stock Companies was served with a copy of the petition but did not appear.

*Warnock*, for the petitioners, stated the facts and asked that the order sought should be made.

[Wilson J.: "This company was on the register in Dublin?"]

*Warnock*—"Yes, but its registered office is in Belfast and therefore it comes within the scope of the Act."

[Wilson J.: "Has the company been struck off the register in Dublin?"—"No."]

"Has it ever been registered in Belfast?"—"No."

"Then the company is still on the only register it ever was on?"

*Warnock*: "That is so; but I submit that the words "replace" and "restore" in the Act must, and can only be, read as "place." Section (5), sub-section (4) of the Act of 1923 appears to be copied from section (248), sub-section (6) of the Companies (Consolidation) Act, 1908."

Wilson J. made the order sought.

The curial portion of this order was as follows:—The petitioners by their counsel undertaking to use their best endeavours to supply to the Registrar of Joint Stock Companies in Northern Ireland the statement and material and necessary particulars as provided by the Companies (Reconstitution of Records) Act (Northern Ireland), 1923, and set forth in the second schedule thereto, this Court doth order that the name of the said Clonard Brick and Estate Company Limited be replaced on the Register of Companies in Northern Ireland pursuant to section 5, sub-section 4 of the last mentioned Act, the said Clonard Brick and Estate Company Limited to be deemed to have continued in existence as if its name had never been struck off. And it is ordered that the Registrar of Companies in Northern Ireland do advertise this order in his official name in the Belfast Gazette.

A. A. C.

Solicitors for petitioners: *Johns, Elliott and Johns.*

K. B. D.
1925
Dec. 11

# BENNETT v. KIDD AND OTHERS (1)

(1925. No. 2575.)

*Landlord and Tenant—Forfeiture—Covenant not to erect buildings of less than a certain valuation—Buildings contravening the covenant erected prior to execution of lease—Term of lease expressed to run from date prior to erection of buildings.*

The plaintiff demised to the defendant certain premises by a lease which contained a covenant forbidding the erection of any dwelling-house erection or building of a less poor law valuation than £16 at the least. The term was expressed to run from a date prior to its execution. Certain buildings of a temporary character and of the class forbidden by the covenant had been erected on the premises prior to the execution of the lease. The plaintiff served on the defendant a notice under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) s. 14, sub.-s. 1 requiring that the buildings should be removed. On the defendant failing to comply with this notice, action was brought.

*Held*, that the covenant took effect only from the execution of the lease and not from the date from which the term was expressed to run; hence there was no breach of the covenant and no forfeiture.

Trial of Action.—On the 23rd May, 1922, the plaintiff William Bennett, accepted an offer made by the defendant, Herbert Kidd, and his brother George Kidd, since deceased, to take a lease of certain premises situate in Brookvale Avenue, Belfast. In pursuance of the agreement the defendant entered on the premises and erected certain buildings of a temporary character which at present are used either as stores or garages. On the 2nd February, 1924, after all the buildings had been erected a lease of the premises was given by the plaintiff to the defendant. This lease contained a covenant, which was not in the original agreement, in the following terms: the defendant "will not erect or cause to be erected on the said demised premises any dwelling-house, erection or building of a less poor law valuation than £16 at the least." If the buildings on the premises were taken as separate units they were all of a less poor law valuation than £16; if the individual unit was to be each separate roof, all but one was over that valuation.

(1) In the King's Bench Division before the Lord Chief Justice.

On the 22nd April, 1925, the plaintiff served on the defendant a notice under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) section 14, subsection 1, requiring him to remove the buildings within thirty days. This notice was not complied with by the defendant and thereupon the plaintiff brought his action to recover possession of the demised premises on forfeiture for breach of the covenant.

The defendants, William M'Kenzie, Hugh M'Kenzie and Robert Weir were asignees of the defendant Kidd.

*Williamson K.C.* (*Lowry* with him), for the plaintiff :—

The covenant in the lease has effect from the date from which the term is expressed to run. In any case, the continuance of the buildings on the premises constitutes a continuing breach and therefore the covenant has been broken.

*M'Gonigal K.C.*, *Beattie K.C.* and *M'Kean* for the defendants :—

The plaintiff cannot succeed since the covenant only takes effect from the date of the execution of the lease and not from the commencement of the term. The covenant has no reference to anything done in the past but only to something that is not to be done in the future. See *Shaw* v. *Kay* (1) where it was decided that in an action for the breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the lease, although the habendum of the lease states the premises to be held from a date prior to its execution. This statement of the law is approved of in Foa on the Law of Landlord and Tenant, sixth edition, at page 113.

*Williamson K.C.*, in reply :—

*Shaw* v. *Kay* (1) only refers to a covenant to repair.

MOORE, C.J. : This action is founded on a notice of the 22nd April, 1925, of breaches of covenant in a lease of the 2nd February, 1924, made between the plaintiff and the defendant Kidd. By that lease Kidd covenanted, inter alia, that he would not erect or cause to be erected on the demised premises any dwelling-house. erection or building of a less poor law valuation than £16

(1) 1 Ex 412

K. B. D. 1925

BENNETT v KIDD & OTHERS

at the least. The term of this lease, notwithstanding the date of its execution, is expressed to run from the 1st May, 1922. On the 22nd May, 1922, the plaintiff, the defendant Kidd and George Kidd, since deceased, signed an agreement for a lease of the premises subsequently demised. That agreement did not contain the above covenant but did contain covenants not in the subsequent lease.

Shortly after the 22nd May, 1922, Kidd, having entered, erected on the premises certain buildings of a temporary nature which are alleged to contravene the covenant in the lease. These buildings are still in existence and the defendants have refused to comply with the plaintiff's demand that they should be removed.

It seems to me, applying *Shaw* v. *Kay* (1), that the erection of these buildings cannot be a breach of a covenant in a lease executed subsequently to their erection. The tenant holding under the lease is bound by covenant not to erect buildings of a certain kind in the future but such a covenant cannot apply to buildings erected prior to the execution of the lease.

The notice of the 22nd April, 1925, which is founded on an alleged breach of covenant fails and the action with it.

Solicitor for the plaintiff: *T. M. Heron.*

Solicitor for the defendant: *Robert Kelly & Son.*

A.A.C.

(1) 1 Ex 412.

## BAILIE v. BLOOMFIELD BAKERY, LIMITED and JAMISON

K. B. D. 1925

Oct. 17

CONTINUED IN THE NAME OF

## BAILIE v. INGLIS & COMPANY, LIMITED and JAMISON (1).

(1925. No. 1306.)

*Practice—Discovery—Party—Action for breach of covenant in Lease—Assignment by defendant after action brought—Assignee substituted for original defendant—Order for Discovery against original defendant refused—R.S.C. 1905 O. 31 r. 12, O. 16 r. 12, ord. 28 r. 11*

The plaintiff brought an action against B. Company claiming damages for breach of the covenants in a lease of certain property. B. Company having assigned their interest in the lease to I. Company, the Court by order dated 23rd June, 1925, substituted I. Company as defendant in place of B. Company and stayed all further proceedings against B. Company. The plaintiff now sought an order that B. Company should make discovery of documents.

*Held*, that the plaintiff was not entitled to the order as B. Company was no longer a party to the action.

*Held*, further, that B. Company could not be joined as a party under R.S.C. 1905 O. 16, r. 12 simply for the purpose of making discovery of documents.

*Held*, further, that the order staying proceedings against B. Company could not be varied under R.S.C. 1905 O. 28, r. 11, as there was no clerical mistake.

MOTION FOR DISCOVERY. The facts as established on affidavit were as follows:—On the 12th March, 1925, the plaintiff issued a writ against the Bloomfield Bakery, Limited, and David Jamison claiming "damages for breaches of a covenant contained in a lease dated the 27th August, 1906, of certain premises situate at Cunningburn, in the County of Down, to keep the said premises in good condition and complete repair and for damages for the wrongful removal of portion of a building situate thereon and for an injunction to restrain the defendant David Jamison from wrongfully removing or destroying the said building." The statement of claim was delivered

(1) In tne King's Bench Division before Brown, J.

K. B. D. 1925

BAILIE v INGLIS & COMPANY, LIMITED, & JAMISON

on the 5th May, 1925, and the defence on the 19th May, 1925.

On the 9th September, 1921, the Bloomfield Bakery, Limited, had assigned their interest in the lease to Inglis & Company, Limited, who had executed a covenant of indemnity.

On the 5th June, 1925, the Bloomfield Bakery, Limited, brought a Third Party notice of motion citing Inglis & Company, Limited, as the Third Party, and asked for the following order:—" That the Third Party be at liberty to defend this action and to appear at the trial and take such part as the judge may direct and be bound by the result of the trial and that the liability of the said Third Party to indemnify the said defendants be tried at or immediately after the trial of this action as the judge may direct." This motion having been heard the Court on the 23rd June, 1925, ordered that Inglis & Company, Limited, should be substituted as defendants in the action in the place of the Bloomfield Bakery, Limited, and that the action should be continued between Bailie as plaintiff and Inglis & Company, Limited, and Jamison as defendants as if Inglis & Company, Limited, had originally been made defendants, and that all further proceedings in the action should be stayed against the Bloomfield Bakery, Limited.

On the 21st October, 1925, the plaintiff issued a notice of motion for discovery of documents by the Bloomfield Bakery, Limited.

*Williamson K.C.* and *Gerald Dougherty* for the plaintiff:—

There would have been no difficulty if the order of June 23rd had been drawn up in the terms of the notice of motion. The plaintiff seeks discovery against a person not at present a party to the action because information in the possession of that party is most material to the plaintiff. If a slip has been made in discharging a proper party, the Court can add him as a third party. There is no direct authority, but in *Willis* v. *Baddeley* (1) it was laid down that where the agents of a principal resident abroad brings an action in his own name, and

(1) [1822] 2 Q.B. 324

on a contract made with him as agent, the defendant is entitled to discovery to the same extent as if the principal were a party to the action and to have the action stayed till such discovery is made. Secondly, an order for discovery can be made in this case by virtue of the inherent jurisdiction of the court. A person cannot it is true, be made a party solely for the purpose of making discovery, see *Burchard* v. *Macfarlane* (1), but any one who could have been a proper party to an action can be joined solely for this purpose, *Spokes* v. *The Grosvenor Hotel Company, Limited* (2). All that the order of June 23rd decides is that it is not necessary for the two companies to contest the issue. The effect is that the Bloomfield Bakery, Limited, were not struck out; Inglis & Company, Limited, were substituted in their place. If the plaintiff is successful in his action what is to prevent him issuing execution against the Bloomfield Bakery, Limited? It is necessary in order that justice should be done, that this order should be made. The ex parte motion for discovery was refused but the Court has inherent jurisdiction to amend and vary any order. The Rules of Court are the servants, not the masters, of the judges.

*Black* for the Bloomfield Bakery, Limited :—

In so far as the present motion is an application to join the Bloomfield Bakery, Limited, as a party, it is in effect an appeal against the order of 23rd June, 1925. If the plaintiff was dissatisfied with that order his only course was to go to the Court of Appeal. No such appeal was brought. In any case the Court will not add a party for the purpose of discovery only, *Elder* v. *Carter* (3), *O'Shea* v. *Wood* (4). In so far as this motion is an application for discovery, discovery cannot be ordered against a person not a party to the action, *James Nelson & Sons, Limited*, v. *Nelson Line* (*Liverpool*), *Limited* (5). The plaintiff applied ex parte for discovery against the Bloomfield Bakery, Limited, and that application was refused. The plaintiff could have appealed against that refusal but did not do

(1) [1891] 2 Q.B. 241
(2) [1897] 2 Q.B. 144
(3) 25 Q.B.D. 194
(4) [1891] Probate Division 237
(5) [1906] 2 K.B. 217

K. B. D. 1925

BAILIE v INGLIS & COMPANY, LIMITED, & JAMISON

so. The matter is res judicata and cannot now be re-opened before this Court.

*Warnock* for Inglis & Company, Limited :—

Discovery can only be ordered against a party between whom and the party applying there is some difference to be decided. The plaintiff cannot issue execution against the Bloomfield Bakery, Limited, since there is no claim of right to be determined between them.

BROWN J. : On the 12th March, 1925, James Bailie issued a writ against the Bloomfield Bakery, Limited, and David Jamison claiming "damages for breaches of a covenant contained in a lease of the 27th August, 1906, of certain premises situate at Cunningburn, in the County of Down, to keep the said premises in good condition and complete repair and for damages for the wrongful removal of portion of a building situate thereon and for an injunction." When the pleadings in the action had been closed, the Bloomfield Bakery, Limited, brought a third party motion asking "That the third party be at liberty to defend this action and to appear at the trial and take such part as the judge may direct and be bound by the result of the trial and that the liability of the said third party to indemnify the said defendants be tried at or immediately after the trial of this action as the judge may direct." This motion was heard and it was ordered :—"That Inglis & Company, Limited, be substituted as defendants in this action in the place of the defendants, the Bloomfield Bakery, Limited, and that this action be continued between James Bailie as plaintiff and the said Inglis & Company, Limited, and David Jamison as defendants as if the said Inglis & Company, Limited, had originally been made defendants; and that all further proceedings against the said Bloomfield Bakery, Limited, be stayed." The result was that in effect the Bloomfield Bakery, Limited, went out of the action and Inglis & Company, Limited, came in. The Bloomfield Bakery, Limited, were no longer personally concerned with the action. At this stage it did not occur to anyone that it would be necessary for the Bloomfield Bakery, Limited, to make discovery of documents in their possession. I am

now asked, in the first place, to order simply that the Bloomfield Bakery, Limited, make discovery. It is clear on the authorities cited to me that this cannot be done, as they are no longer a party to the action.

In the second place, I am asked to add the Bloomfield Bakery, Limited, as a defendant under Rules of the Supreme Court, order 16, rule 12. Now this is merely a rule for the joinder of parties. In no circumstances can a party be added for the sole purpose of making discovery. The Bloomfield Bakery, Limited, are required as a party solely for this purpose; their interest in

In the third place, the plaintiff says that I should vary the previous order under Rules of the Supreme Court, order 28, rule 11, and by virtue of the inherent jurisdiction of the Court. That Order is the slip Order and refers only to clerical mistake. That Order cannot cover a case such as this where an order properly and correctly made has now by a change of circumstances become a hardship to one of the parties. I have no power to vary the order and the motion must be refused with costs.

Solicitor for the plaintiff: *John M'Kee.*

Solicitor for the Bloomfield Bakery, Limited: *Robert Wallace.*

Solicitors for Inglis & Company, Limited: *Wheeler & M'Cutcheon.*

A.A'C.

C. A. 1925

Nov. 16
Dec. 4

[IN THE COURT OF APPEAL.]

# CORPORATION OF LONDONDERRY

v.

# OSBORNE (1).

*Tolls—Market—Sale of milk outside the market, but within the limits of City of Londonderry—Londonderry Corporation Act, 1918 (8 & 9 Geo. 5, c. XXI.), s. 239.*

A local Act (8 & 9 Geo. 5 c. xxi) to make further and better provision for the improvement, health and local government of the city of L., provided by c. 239 that (a) "notwithstanding anything contained in the Act of 1848 or the Act of 1896, the Corporation may demand and receive for the use of their markets, and of the stalls and standings therein, and in respect of animals and things brought into the market, and for the use of their slaughter-houses, weighing-houses and weighing-places and machines such stallages, rents, tolls and charges as the Corporation may from time to time appoint not exceeding such stallages, rents, tolls or charges as may for the time being be prescribed by the Local Government Board upon the application of the Corporation; and any stallages, rents, tolls and charges so prescribed shall be substituted for the stallages, rents, tolls, or charges specified in Schedule (D) to the Act of 1848 and in Schedule B to the Act of 1896. (b) Unless and until any stallages, rents, tolls and charges shall be prescribed by the Local Government Board in pursuance of this section nothing in this section contained shall affect the right of the Corporation to demand and receive the stallages, rents, tolls and charges which they are now authorized to take."

The Corporation by resolution made a revised schedule of market tolls, which was duly approved by the Local Government Board. By this schedule, in accordance with the Act, the tolls on sweet milk were increased as follows:—"Sweet milk. For each quantity of 25 gallons or part thereof per day, sixpence." The defendant is a supplier of milk daily to certain customers in the City of L. The milk is despatched from outside the city by the defendant, in his own carts and by his own servants, and it is sold within the city boundary to his customers. It is not sold in the market, and in respect of its sale the plaintiffs do not render any services to the defendants.

*Held*, by the Court of Appeal (Andrews and Best L.JJ.) that the plaintiffs were not entitled to charge the increased rate of toll under section 239 of the 8 & 9 Geo. 5, c. xxi.

CASE STATED by Moore LJ. for the opinion of His Majesty's Court of Appeal in Northern Ireland at the

(1) In the Court of Appeal before Andrews and Best, L J J.

County of Londonderry Summer Assizes, 1925, on an appeal from the Recorder of Londonderry.

The civil bill had been brought by the Corporation of Londonderry against Walter J. Osborne for tolls in respect of sweet milk sold by the defendant within the municipal limits of the City of Londonderry, but outside the Corporation markets. The Recorder gave judgment in favour of the Corporation, and the defendant appealed.

The following were the facts :—The defendant supplies milk daily to certain customers in the City of Londonderry. The milk is despatched from outside the city in the defendant's own carts and by his own servants, and is sold within the city boundary to his customers. It is not sold in the market and in respect of its sale the plaintiffs do not render any services to the defendant.

The Londonderry Corporation Act (8 & 9 Geo. 5, c. xxi), passed in 1918, contained provisions as to the levying of market tolls by the Corporation.

Section 239 provided that (a) "notwithstanding anything contained in the Act of 1848 or the Act of 1896 the Corporation may demand and receive for the use of their markets, and of the stalls and standings therein, and in respect of animals and things brought into the markets, and for the use of their slaughter-houses, weighing-houses, and weighing-places and machines such stallages, rents, tolls, or charges as may for the time being be prescribed by the Local Government Board, upon the application of the Corporation and any stallages, rents, tolls, and charges so prescribed shall be substituted for the stallages, rents, tolls or charges specified in Schedule (D) to the Act of 1848 and in Schedule B to the Act of 1896.

(b) Unless and until any stallages, rents, tolls, and charges shall be prescribed by the Local Government Board in pursuance of this section nothing in this section contained shall affect the right of the Corporation to demand and receive the stallages, rents, tolls and charges which they are now authorized to take."

The Corporation made a revised schedule of market tolls, weighing and stallage by a resolution of the County Council of the County Borough on the 18th October, 1920, approved by the Local Government Board on 18th March, 1921. In accordance with the Act the tolls on sweet milk were increased as follows :—

"Sweet Milk. For each quantity of 25 gallons or part thereof per day sixpence."

Liability for the rate of tolls imposed by the Londonderry Improvement Act, 1896 (59 & 60 Vict. c. ccxlix) was admitted on behalf of the defendant, but it was con-

C. A. 1925

CORPORATION OF LONDONDERRY v OSBORNE

tended that the toll imposed by the Londonderry Corporation Act, 1918 (8 & 9 Geo. 5, c. xxi) was in the circumstances of the case inapplicable. It was also contended on his behalf that except in cases where the markets were used by the vendor the Corporation had no power to make tolls under the Act of 1918.

The question for the determination of the Court was "Whether in the premises the plaintiffs were entitled to charge the increased rate under section 239 of the Londonderry Corporation Act, 1918 (8 & 9 Geo. 5, c. xxi), or whether for milk not sold in the market but sold and delivered at customers' private houses they were bound to accept the toll under the Londonderry Improvement Act, 1896 (59 & 60 Vict., c. cclix).

*A. B. Babington K.C.* (*Attorney-General*), *E. S. Murphy K.C.* and *Lowry* for the Corporation of Londonderry :—

The sole question is whether the defendant is liable to certain tolls and charges imposed under the Londonderry Corporation Act, 1918, by a revised schedule of tolls put in force by the Corporation and approved by the Local Government Board. Under that schedule of charges there was a toll on each 25 gallons of sweet milk, or part thereof, of sixpence per day. Under the Londonderry Improvement Act, 1896, the toll was for a much lesser amount, viz., for every quantity of sweet or butter milk of 100 gallons or under, one penny per day. The tolls had thus been substantially increased by the Act of 1918. In view of *The Mayor of Londonderry* v. *M'Elhinney* (1), *Town Commissioners of Newtownards* v. *Woods* (2), *Gracey* v. *Banbridge Urban District Council* (3), the Londonderry Improvement Act, 1896, was passed. Section 26 of this Act provided "that all the tolls payable under the Londonderry Improvement Act, 1848 and under this Act shall be payable to the Corporation on all marketable commodities . . . notwithstanding that the whole or the bulk of such marketable commodities sold or offered for sale may not have been brought into the market place or buildings or ground connected therewith or be within the city at the time of such sale or offer for sale.

(1) I.R. 9 C.L. 61
(2) I.R. 11 C.L. 506
(3) [1905] 2 I.R. 209

We rely on the *Corporation of Londonderry* v. *Moore* (1), a precise authority so far as the tolls authorized by the Act of 1896 are concerned. The judgment of Holmes LJ. in that case is strongly in our favour (see pp. 252-253). He says at p. 253 "the keynote to the intention is found in the declaration that tolls shall be payable on marketable commodities if they are sold or offered for sale within the city, out of doors. The main object is that such commodities are not to be placed in a better position than commodities brought into the market-place to be sold there." *Londonderry Corporation* v. *Moore* (1) has a very close bearing on the present case. The word "charges" which occurs in section 239 of the Londonderry Corporation Act, 1918, is the most general expression which could be used. "Markets" for the purposes of this section include the whole city. We submit that this is a case of substitution, and that the provisions of section 26 dealing with commodities which have not been brought into the market should be read into the Act of 1918. The word "charges" was, we submit, introduced into the Act of 1918 for a particular purpose, to remove ambiguity. As to the meaning of the word "market" we rely on *Gingell, Son & Foskett, Limited* v. *Stepney Borough Council* (2). It is inconceivable that the legislature altered its intention in 1918 from what it had been in 1896, and provided in effect that no milk should ever be sold within the market.

*Beatty K.C.* and *M'Coy* for the defendant :—

An Act of Parliament imposing a tax must be construed strictly in favour of the person sought to be taxed; and further, a private Act must be construed most strongly against the promoters, especially where it is sought to increase the burden twenty-four times. On this point we rely on *In re Finance Act, 1894, and Studdert* (3), where Fitzgibbon L.J. says at p. 410 " If it be doubtful or difficult of interpretation, which I do not think it is, the Finance Act is subject to the rule that no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject." If the charge in the present case is to be imposed, it must be

(1) [1899] 2 I.R. 247
(2) [1906] 2 K.B. 468
(3) [1900] 2 I.R. 400

C. A 1925

CORPORATION OF LONDONDERRY v OSBORNE

authorized by clear and unambiguous language. Under the Act of 1848 no toll could have been imposed on the defendant. The terms of the Act of 1896 are perfectly clear and we admit that the defendant continues to be liable under it. We submit that the Act of 1896 is still in operation and is not superseded by the Act of 1918. We contend that these Acts are cumulative. The Act of 1896 was well known to the promoters of the Act of 1918. The Act of 1918 must be construed according to its own language, which is perfectly clear and unambiguous. The Act of 1918 only affects those who use the market. We submit that the substitution is quâ market places or markets only and that the 1896 Act is the only statute dealing with milk sold from door to door.

*Cur. adv. vult.*

Dec. 4

ANDREWS LJ. delivered the judgment of the Court as follows:—

This matter comes before us in the form of a Case Stated by the Lord Chief Justice (then Lord Justice Moore) on the hearing of a civil bill appeal at the Summer Assizes for the County of Londonderry. The plaintiffs' claim was for £8 4s 7d in respect of tolls on sweet milk sold by the defendant in the City of Londonderry.

The defendant, who is a dairyman residing in the County of Londonderry, supplies milk daily to customers in the City of Londonderry. It is not sold in the market place, and it is admitted that the plaintiffs, who own the public markets, do not render him any services. The question for our determination is whether the plaintiffs are in the circumstances entitled to charge the defendant for tolls at the rate fixed by schedule adopted by the plaintiffs by resolution of 18th October, 1920, and approved of by the Local Government Board on 18th March, 1921, pursuant to the powers vested in them under Section 239 of the Londonderry Corporation Act, 1918.

In my opinion, the case turns entirely upon the true construction of that section. It is not disputed that, apart from statute, tolls cannot be made payable upon goods which are not actually brought into the market for sale.

As Farwell J. expressed it in *Newcastle (Duke of)* v. *Worksop Urban Council* (1), "The justification for the grant of "tolls in a market or fair is the same as that in the "*Hungerford Case* (2), namely, service to the public." The principle is the same whether the claim be based on Royal Grant as in *Kerby* v. *Whichelow* (3), or on the common law, *Hill* v. *Smith* (4), or on prescription, *Wells* v. *Miles* (5).

Mr. Murphy, for the plaintiffs, cited to us several Irish authorities, in which the decisions of the magistrates in prosecutions for penalties under Section 13 of the Markets and Fairs Clauses Act, 1847, were reviewed, but I do not refer to any of them, as they raised an entirely different issue by reason of the proceedings being of a criminal character brought under a different Act of Parliament from that which arises for our consideration in the present case.

I turn, however, to the case of the *Corporation of Londonderry* v. *Moore* (6), which was so strongly relied upon by plaintiffs' counsel. Resting as it does on a different section of another Act of Parliament, it is obviously not a conclusive authority; and, after a careful perusal of the judgment of Holmes LJ., I do not hesitate to say that I regard it as more damaging than helpful to the plaintiffs' case. The defendant Moore, who, like the present defendant, was a milkman, was sued for tolls under Section 26 of The Londonderry Improvement Act, 1896, by which it was provided that it should be lawful for the Corporation from time to time to demand from any person bringing into the existing or any future market-place or places or building or ground connected therewith within the city any marketable commodity specified in Schedule B to that Act annexed, such tolls as the Corporation should from time to time appoint, not exceeding the tolls specified in the said schedule, and such tolls should be supplementary or in addition to the tolls authorised by the Londonderry Improvement Act, 1848 (Schedule D), to be paid to the

(1) [1902] 2 Ch. 145 at p. 161-2
(2) 3 E. & E. 365
(3) [1701] 2 Lutwyche's Reports [1498] see Judgment of Powell, J., at p 1502
(4) 4 Taunt, 520
(5) B. & Ald. 559
(6) [1899] 2 I.R. 247

C. A. 1925

CORPORATION OF LONDONDERRY v. OSBORNE

Corporation; and further that all the tolls payable under the said Act of 1848 and under that Act (the Act of 1896) should be payable to the Corporation on all marketable commodities specified as the subject of toll thereunder respectively, notwithstanding that the whole of the bulk of such marketable commodities sold or offered for sale might not have been brought into the market place or buildings or ground connected therewith, or be within the city at the time of such sale or offer for sale, if such sale or offer for sale was in fact made by sample or otherwise within the city, provided always that the tolls aforesaid should not be payable if the sale be made in the dwelling-house or shop of the person making such sale. The tolls in Schedule B included sweet milk, and the defendant, who sold milk to customers in the city under circumstances similar to, if not absolutely identical with, the present, was held liable to pay the tolls.

It is obvious that the section was drafted with the object of circumventing the old common law principle to which I have referred, and thus of creating a liability for tolls though the goods were not brought into the market. The Court held that the section achieved its object; for, though clumsily drafted, its meaning was not obscure.

In his judgment, Holmes LJ. refers to The Londonderry Improvement Act, 1848, by Section 38 of which it was provided that it should be lawful for the Council from time to time to demand from any persons occupying or using any stand, stall, shed, pen, or place in any such existing or future market places or buildings, or grounds connected therewith, or bringing into such market place, or buildings, or ground, any marketable commodities specified in Schedule D annexed, such stallages, rents, and tolls as the Council should from time to time appoint not exceeding those specified in the said Schedule. Up to this point Holmes LJ. says that there could be no doubt as to the meaning of the legislation that tolls could only be demanded for marketable commodities brought into the market-place; and that, although it might be possible by means of the penalty to oblige the sellers of such commodities to bring them into the market-place, no toll could be recovered for selling or exposing them for sale elsewhere. Coming next to the Act of 1896 he considers that the opening portion of Section 26 is in effect identical in

terms with the words of the earlier Act, and, accordingly, that under it also tolls were only imposed upon articles brought into the market-place. It is the latter half of the section which in express terms extends the liability for tolls to cases in which the commodities were not brought into the market-place. "The keynote to the intention," he says, "is found in the declaration that tolls shall be payable on marketable commodities if they are sold or offered for sale within the city, out of doors." "The main object is," he continues, "that such commodities are not to be placed in a better position than commodities brought into the market-place to be sold there."

Plaintiffs' counsel places great reliance on these passages of the judgment, but, in my opinion, they do not assist the plaintiffs' case in any way. The Lord Justice is not giving expression to any general principles of the law as to the incidence of tolls. He is merely referring to the "intention" and the "object" which he finds in the special words of the latter portion of Section 26.

I turn now to the Section which we are called upon to construe, namely, Section 239 of The Londonderry Corporation Act, 1918. Sub-section (1) reads as follows:—

"Notwithstanding anything contained in the Act of 1848 or the Act of 1896, the Corporation may demand and receive *for the use of their markets*, and of the stalls and standings therein, *and in respect of* animals and *things brought into the markets*, and for the use of their slaughter-houses, weighing-houses, and weighing-places and machines such stallages, rents, tolls and charges as the Corporation may from time to time appoint not exceeding such stallages, rents, tolls or charges as may for the time being be prescribed by the Local Government Board upon the application of the Corporation; and any stallages, rents, tolls, and charges so prescribed shall be substituted for the stallages, rents, tolls, or charges specified in Schedule (D) to the Act of 1848 and in Schedule B to the Act of 1896."

I have italicized the words of the section which appear to me to call for special emphasis. Tolls are payable to the Corporation "for the use of their markets" and "in respect of . . . things brought into the markets." These are conditions which, under the section, must exist before liability for tolls arises; and it is significant to note that they are precisely the same conditions as are to be found in Section 38 of the Act of 1848, in the construction of which Holmes LJ. considered, as already pointed out, that there was no doubt that tolls could only be demanded for marketable commodities brought into the market-place. In other words, Section 239 of the Act of 1918

C. A. 1925

CORPORATION OF LONDONDERRY v. OSBORNE

lacks the concluding words of Section 26 of the Act of 1896 in which are found the special "intention" and "object" of the legislature that marketable commodities, if they are sold or offered for sale within the city out of doors, are not to be placed in a better position than commodities brought into the market-place to be sold there.

Pressed with these facts, Mr. Murphy was driven to argue that the word "market" in the 239th Section is to be construed, not as meaning the market-place, but as the whole city; and that, accordingly, a sale of milk at customers' doors is a sale in and a use of the market. Incidentally, this argument is in direct conflict with another independent argument which he advanced, namely, that the use of the word "charges" in addition to "tolls" in the section showed an intention on the part of the legislature to impose a liability in respect of sales within the city but outside the markets. In my opinion, neither contention is sustainable. The definition of "market" which he cited from Stroud's Legal Dictionary as denoting an appointed place of buying and selling is against him. So also is the definition of the expression "the market or fair" in Section 3 of the Market and Fairs Clauses Act, 1847. And the matter is made still more clear by reference to several other sections in the Londonderry Corporation Acts, which show that the word "market" is intended to refer to a much more limited area than the word "city," and that the terms are in no sense synonymous. So also as regards the special significance which it is sought to attach to the word "charges." I have only to say that if it was intended to bear the meaning suggested, it is very remarkable that it is not to be found where it would be so appropriate in Section 26 of the Act of 1896, under which the tolls there referred to are payable in respect of sale of commodities inside the city but outside the market.

Lastly, plaintiffs' counsel relies upon the argument ab. inconvenienti that, though no tolls should be payable unless the commodity was brought into the market, yet a penalty could be imposed under Section 13 of the Markets and Fairs Clauses Act, 1847, if a sale were effected elsewhere within the prescribed limits i.e., within the city boundary. Such an argument can never prevail over the natural, and I may say, in the present case, the necessary

meaning to be attributed to the words which the legislature has used. It can carry no more weight in the construction of the Act of 1918 than Holmes LJ. recognised that it possessed in the construction of the Act of 1848.

I have nothing to say as to whether this result was or was not intended by the legislature; I have only to construe the language which it used. It may well be, to use the expression of Holmes LJ., that the legislature has again "altered its mind" and reverted closer to the principles of the common law; and that it would never have countenanced a twenty-four fold increase of a toll upon a sale of an article in respect of which the plaintiffs rendered no services whatever to the defendant.

We answer the question submitted to us that, in the circumstances set forth in the Case Stated, the plaintiffs are not entitled to charge the increased rate of toll under Section 239 of the Act of 1918.

I purposely refrain from expressing any opinion as to the defendant's liability, in the events which have happened, for the toll imposed by the Act of 1896, which plaintiffs' counsel submitted was now "non-operative." The liability has for the purposes of the present case been admitted by the defendant's counsel, and, accordingly, not argued before us.

Solicitor for the Corporation of Londonderry : *Sir F. H. Miller.*

Solicitors for the defendant : *Todd & Mark.*

J.McC.

C. A.
1925
Nov. 2

[IN THE COURT OF APPEAL.]

THOMAS GREER, Appellant;

THE BELFAST AND COUNTY DOWN RAILWAY, Respondent (1).

*Railway Company—Liability to fence—Railway line unfenced at sea shore—Railway Regulation Act, 1842 (5 & 6 Vict., c. 55) s. 10—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20) s. 68—County Down Railway Act, 1846.*

The plaintiff was tenant of certain grazing land bounded on one side by a bank which bordered the sea shore. There was no fence between this bank and the sea shore, nor anything to prevent cattle from getting on to the sea shore. One of the plaintiff's cows went from the bank to the sea shore and wandered on to the railway line at a point where it was unfenced and it was killed. In proceedings by Civil Bill against the company for negligently failing in their statutory duty to fence their railway,

*Held*, by the Court of Appeal (Moore C.J. and Andrews L.J.) that the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20 imposed no obligations on railway companies to fence lands save as regards adjoining lands and the owners thereof, and that therefore the company was not liable.

CASE STATED for the opinion of His Majesty's Court of Appeal in Northern Ireland by Brown J. from the County of Down Spring Assizes in March, 1925.

This case came before me at the Assizes for the County of Down held at Downpatrick on the 7th day of March, 1925, by way of Appeal from a Dismiss by the County Court Judge at Newtownards on 29th October, 1924.

*Hume* for plaintiff.

*Pringle K.C.* and *Warnock* for defendants.

The plaintiff's civil bill, dated 3rd September, 1924, claimed £30 for loss and damage sustained by the plaintiff by reason of the negligence of the defendant company on 31st May, 1924, whereby a cow, plaintiff's property, was killed on the railway line at Kinnegar, near Holywood. On the application of Mr. Hume I amended the civil bill by adding a count for breach of statutory duty.

A map was produced and proved and is incorporated with this case.

(1) In the Court of Appeal before Moore, C.J., and Andrews, L.J.

I find the following facts. The plaintiff's cow, value £30, was killed by the defendants' train on the morning of 31st May, 1924. There was no negligence on the part of the defendants in the driving or management of the train. The plaintiff had been previously warned about his cattle straying on the defendants' line by letter of 18th October, 1923.

On the Belfast side of Holywood lies a tract of land used by the War Department as a rifle range. It is also let for grazing and on 31st May, 1924, the plaintiff had the grazing and had cattle including the cow the subject matter of this action thereon. The land is bounded on the seaside by a bank to keep out the sea. Cattle can and do graze upon this bank. There is no fence between this bank and the seashore and there is nothing to prevent cattle from getting on to the seashore. The plaintiff has no grazing rights beyond B. Between the point "B" marked on the map and the town of Holywood there is an adequate fence between the railway and the said lands and a small fence runs out seawards at the point "B." The continuation of this small fence marked red has been constructed since the occurrence complained of but not by the railway company. Between "B" and "A" the railway line is not fenced to the sea. Cattle cannot get from any part of the bank or from any part of the lands on to the railway except by going on to the seashore. The cow which was killed went from the bank to the seashore and thence on to the railway line at a point between "B" and "A."

This portion of the railway line was constructed prior to 1855 under powers conferred by the County Down Railway Act of 1846. This Act incorporated the provisions of the Railways Regulation Act of 1842, and the Railway Clauses Consolidation Act, 1846.

In 1855, an Act was passed repealing the County Down Railway Act of 1846, and creating a new company called The Belfast and County Down Railway Company. The Act of 1855 did not incorporate the Railways Regulation Act of 1842.

For the defendants it was contended that the Act of 1846 was repealed by the Act of 1855 and that, as the

C. A. 1925

GREER v THE BELFAST AND COUNTY DOWN RAILWAY

section which incorporated the Railways Regulation Act, 1842, was also repealed the liability to fence the said railway line depended only upon the Act of 1855 and that, as the Act of 1855 only incorporated the Railway Clauses Consolidation Act, 1845, and not the Railway Regulation Act, 1842, the liability to fence was confined to fencing between the railway and other lands not taken by the railway and that this duty being fully carried out, there was no breach of duty on the part of the defendants and they were not liable.

For the plaintiff it was contended that this part of the railway was constructed under the Act of 1846 and that the Act of 1846, being passed after the Railway Clauses Consolidation Act of 1845, expressly incorporated the Railway Regulation Act of 1842. That when this part of the line was constructed, the liability to fence was that contained in the said incorporated Acts of both 1842 and 1845 and that by Section 10 of the Railway Regulation Act of 1842 the company was bound to fence throughout the whole length of its lines. That this liability on the part of the old company with regard to that part of the line was transferred to the new company and that the liability as to fences contained in the Act of 1855 only applied with regard to that part of the said line which was in fact constructed under the powers conferred by the Act of 1855 Further that the title and recitals of the Act of 1855 showed that the rights and liabilities of the old company were transferred to the new company.

Upon the application of the plaintiff I agreed to state this case.

The question for the Court is

(1) Have the defendants the railway company fulfilled the obligations and liabilities to fence along their line imposed upon them by statutes?

If the answer is in the negative there will be a decree for £30 with costs in the County Court and of Appeal, together with £1 witnesses expenses in the court below and £1 witnesses expenses on appeal.

If the answer is in the affirmative, the Dismiss of the County Court Judge is to be affirmed without costs.

*Hume* for the plaintiff, Thomas Greer :—

There is a duty on the defendants to erect and maintain

fences throughout the whole of their line. The liability to fence is imposed by the Railway Regulation Act of 1842, s. 10, which has never been repealed. It was by reason of the failure of the defendants to carry out their statutory obligations that the cow was on the railway line. The liability as to fences contained in the County Down Railway Act of 1855 only applied to that part of the line which was constructed under the powers conferred by that Act. On the facts and authorities the defendants have not maintained their obligations to erect and maintain fences. I rely on s. 3 of the County Down Railway Act of 1855.

[He referred to *The Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (1).]

*Pringle K.C.* and *Warnock* for the defendants the Belfast and County Down Railway Limited :—

The plaintiff rests his case on s. 10 of the Railway Act, 1842. This section was however practically repealed by s. 68 of the Railway Clauses Consolidation Act, 1845. Any provision in the Railway Clauses Consolidation Act, 1845, must be considered as being in substitution for any provision dealing with the same subject in the Railway Regulation Act, 1842. We rely on the *Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (1). We contend that s. 10 of the Railway Regulation Act, 1842, does not apply to the present case. The railway company was only obliged to make and maintain fences for the accommodation of owners and occupiers of lands adjoining the railway. We rely on *Ricketts* v. *The East and West India Docks and Birmingham Junction Railway Company* (2), and especially on the judgment of Jervis C.J. at pp. 173-175. We also rely on the judgment of Lord Esher in *Charman* v. *South-Eastern Railway Company* (3), at pp. 527-528. We submit that the only obligation which binds the defendants to keep and maintain fences is that contained in s. 68 of the Railway Clauses Consolidation Act, 1845.

MOORE C.J. : This is an interesting case, and one of some importance. (His Lordship having stated the facts

Nov. 2

(1) 23 L.J. C.P. 85
(2) 12 C.B. p 160
(3) 21 Q.B.D. p 524

C. A. 1925

GREER v THE BELFAST AND COUNTY DOWN RAILWAY

continued.) Cattle can stray from the Kinnegar to the shore, and so can get down to a place where the railway company does not maintain a fence and can thence pass on to the defendants' line where they are liable to be injured by passing trains. It was in such a way that the present cause of action arose.

The case for the plaintiff is that the cow would not have been killed if the railway company had fenced their land. Section 10 of the Railway Regulation Act, 1842, provides that " All railway companies shall be under the same liability or obligation to erect, and to maintain and repair, good and suffcient fences throughout the whole of their respective lines, as they would have been if every part of such fences had been originally ordered to be made under an order of justices by virtue of the provisions to that effect in the Acts of Parliament relating to such railways respectively."

If this section is to bear the meaning that has been attached to it by counsel on behalf of the plaintiff it would follow that the railway company would be obliged to fence all the land belonging to their system.

But section 68 of the Railway Clauses Consolidation Act, 1845, provides that as between adjoining owners and a railway company, the railway company shall make and maintain fences for the accommodation of the owners and occupiers of lands adjoining the railway.

We can say as was said in the *Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (1) that the Railway Clauses Consolidation Act, 1845, has been substituted for the Railway Regulation Act, 1842.

I am of opinion that there is a great deal to be said for the argument that has been presented by Mr. Warnock that Section 10 of the Railway Regulation Act, 1842, does not apply to the present case at all. The railway company is not under any obligation to fence except as against adjoining owners, and here there was no adjoining owner on the foreshore.

We will make a special order that the Court, being of opinion that in so far as the accident occurred by reason

(1) 23 L.J. C.P 85

of the defendant company not having made or maintained a fence where the cow trespassed on the line and was killed, the plaintiff has no right of action inasmuch as he was not owner of the lands adjoining the railway there, and that the action should stand dismissed.

We order the plaintiff to pay the costs of the case stated, measured at the sum of £15 15s 0d.

ANDREWS, L.J. : It is not necessary for us to decide in the present case that Section 10 of the Railway Regulation Act, 1842 (5 & 6 Vict , c. 55) has been impliedly repealed by Section 68 of the Railways Clauses Consolidation Act (8 & 9 Vict., c. 20). It is sufficient for us to hold, as I do without any doubt that Section 10 of the Railway Regulation Act, 1842, (5 & 6 Vict., c. 55) never applied to the portion of the defendants' railway which was constructed under the County Down Railway Act of 1846. As was pointed out by Mr. Warnock, many railway companies had, shortly prior to 1842, obtained private Acts of Parliament for the construction of their lines and these Acts contained obligations as regards fencing, the precise nature and extent of which were determined by an order of the justices. The Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), which was one of the first public Railway Acts imposed the same obligations as regards railways which were then about to be constructed. This was an obligation to erect, maintain and repair good and sufficient fences throughout the whole of their respective lines Then followed the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20), part of a complete railway code, the whole of which received the Royal Assent on the same day. That Act deals in Section 68 with fencing obligations, and I have no doubt whatever that it was intended to supersede the Railway Regulation Act, 1842 (5 & 6 Vict., c. 55), at least as regards railways which had not then been constructed. To this extent at any rate, the decision of the Court in *The Manchester, Sheffield and Lincolnshire Railway Company* v. *Wallis* (1) cannot be doubted. As pointed out by Lord

(1) 23 L.J. C.P. 85

C. A. 1925

GREER v. THE BELFAST AND COUNTY DOWN RAILWAY

Esher M.R., in *Charman* v. *The South-Eastern Railway Company* (1), it is too late to question the authority of that decision.

When we turn to Section 68 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20) we find that no obligation is imposed upon railway companies save as regards adjoining lands and the owners thereof.

The plaintiff in the present case was not the owner or occupier of the adjoining lands which consisted merely of the foreshore. He had a right of grazing upon the lands of the Kinnegar from which, notwithstanding the warnings of the railway company, he allowed his cow to wander and trespass first on the foreshore and afterwards on the railway company's line where it was killed. *Ricketts* v. *The East and West India Docks and Birmingham Junction Railway Company* (2), of which I express my respectful approval, is in my opinion a clear authority that in such circumstances the plaintiff is not entitled to recover. I therefore agree that the plaintiff's civil bill should be dismissed.

Solicitor for the plaintiff: *John M'Kee.*

Solicitor for the defendants: *A. J. Lewis*

J.McC.

(1) 21 Q.B.D 524 at p 527 (2) 12 C B. 160

## TIMONEY v. TIMONEY (1).

*Husband and Wife—Married Woman—Temporary agreement to separate—Desertion—Married Women (Maintenance in Case of Desertion) Act, 49 & 50 Vict., c. 52.*

K. B. D. 1925

Dec. 21

A husband and wife agreed to separate immediately after their marriage until the husband, who was a constable in the Royal Ulster Constabulary, had sufficient length of service to permit him to support his wife. When the agreement expired the husband refused to co-habit with his wife and refused and neglected to maintain her.

On a summons by the wife against the husband for desertion, the magistrates at the hearing were of the opinion that the husband had deserted his wife, and gave judgment against him.

On a case stated for the opinion of the King's Bench Division, *Held*, that the decision of the magistrates was correct.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division (Crown side), by R. W. Glass, R.M., John Pinkerton and John Desmond, Justices, from the Claudy Petty Sessions held on the 5th June, 1925. The case stated set out the facts as follows:—

At the Petty Sessions held at Claudy, County Londonderry, on the 5th June, 1925, a complaint was made against James Timoney, the defendant, by his wife Brigid Elizabeth Timoney, that he on the 1st May, 1925, and subsequently, being able wholly to maintain his said wife and family neglected or refused to do so and had deserted his said wife.

Upon the hearing of the said summons before us, we, the undersigned Justices, ordered that the defendant should pay to the complainant the sum of 35/- per week from the 1st May, 1925, together with the sum of £1 costs.

At the hearing of the said summons the complainant stated on oath that she had met the defendant about the year 1916 at Lisburn, where she was a nurse and he was stationed as a constable of the Royal Irish Constabulary; that she was married to him at St Malachy's Church, Belfast, on the 21st January, 1918, the officiating clergyman being the Very Reverend Daniel McCashin and the witnesses being one Peter Lynch (sexton to the church)

(1) Before the Moore, C.J., and Wilson J.

K.B.D. 1925

TIMONEY v TIMONEY

and Cassie Kelloran (housekeeper to the parish priest); that the Reverend Daniel McCashin died on the 21st June, 1919, and that Peter Lynch was also dead · that at the time of the marriage the defendant told her that he could not obtain the consent of the authorities to his marriage as he had not served the required number of years, and therefore for about two years they would not be able to live together; that under the circumstances she was obliged to assent; that the facts of the defendant's position were explained to the officiating clergyman by the defendant, and for that reason no certificate of the marriage was sent to the civil authority; that for the same reason of protecting the defendant against trouble with his authorities, the marriage register was not signed by either of the parties to the marriage or the witnesses, but was registered in the private register of St. Malachy's Church. At the end of two years she asked the defendant to take up house and had done so several times since, but he had refused to do so or to support her and the child. She produced a postcard from the defendant signed "Your loving husband, Jim," and a letter from him offering to take the child and enclosing £5 and promising more. She had two or three times received money from him to assist in the support of herself and their child, and that the last sum she had received was £5 in February, 1925. That she was paying 10/- per week for the upkeep of the child, and the amounts received from the defendant were only occasional and quite insufficient.

On cross-examination the witness stated that the marriage took place at 8 o'clock p.m., and that the register was not signed for the reasons already stated by her; that after the marriage she returned to her duties and he to his barracks. She was forced to consent to the defendant's request that they should live apart for a year and a half until he could admit the marriage to his authorities and take up house publicly, and that there had been no co-habitation since.

No witnesses were called on behalf of the defendant, nor was the fact of the marriage between complainant and the defendant denied on behalf of the defendant.

Mr. A. A. Macauley urged on behalf of the defendant that no order for maintenance under the Married Woman

(Maintenance in case of Desertion) Act, 1886, could be made, on the ground that there had been a mutual agreement between the complainant and the defendant to separate after the marriage on the 21st January, 1918, and that as there had been no existing state of co-habitation at the date of the alleged desertion, viz., the 1st May, 1925, the Justices could not make an order under the summons before them.

On behalf of the complainant, Mr. T. E. Conaghan, solicitor, urged that in the present case there was no agreement to live apart for all time, but there was a request by the defendant to his wife that there should be no co-habitation until he had completed the requisite number of years service in the Royal Irish Constabulary entitling him to get married without committing a breach of regulations, and that to this proposal the complainant was forced to consent; that there was no consideration to support the alleged agreement and that the agreement was broken by the premeditated fraud of the defendant, who from the first was determined to abandon his wife. At the end of the prescribed period the wife requested the defendant to take up house: the defendant refused and continued his refusal, and this refusal constituted desertion, which entitled the complainant to the benefit of the Act.

Upon the said hearing we, the Justices, were satisfied that the complainant and defendant were properly and legally married, and that the defendant had refused and neglected to support his wife and family and accordingly we gave judgment against the defendant as aforesaid.

The judgment of the Court is required as to whether, we, the said Justices, were correct in point of law, in our determination as aforesaid, or as to what should be done in the premises.

*T. J. Campbell K.C.* and *A. A. Macauley* for the defendant:—

It is necessary that co-habitation should have existed immediately prior to the alleged desertion. In fact, in view of the agreement made between the parties there was no desertion. There was neither evidence, nor a finding by the magistrates, that the husband had wilfully neglected

K. B. D. 1925

TIMONEY v TIMONEY

to support his wife as required by the statute (Married Women (Maintenance in case of Desertion) Act) (1). There was neither evidence nor a finding that the husband was able to support his wife. Desertion implies an act of withdrawal from an existing state of co-habitation. This case is distinguishable from *De Laubenque* v. *De Laubenque* (2) as here there was a clear contract to separate. Desertion is not separation, but implies a wilful absconding by the husband despite the wishes of the wife. The onus was on the complainant to prove, before the magistrates, means to maintain and wilful neglect to do so:—*Kates v. Jeffery* (3).

The following cases were cited:—*Fitzgerald* v. *Fitzgerald* (4), *Buckmaster* v. *Buckmaster* (5), *Parkinson* v. *Parkinson* (6), *Pape* v. *Pape* (7), *The Queen* v. *Leresche* (8), *The Guardians of Drogheda* v. *McCann* (9).

*McGonigal K.C.* and *Shiel* for the plaintiff:—

There may be desertion without previous co-habitation:—*De Laubenque* v. *De Laubenque* (2). The separation in this case was due to an external reason caused by the defendant. In all cases cited on behalf of the defendant, except *Fitzgerald* v. *Fitzgerald* (4), there were agreements for permanent separation, which could not be ended except by consent of the parties, or where, as in *Hussey* v. *Hussey* (10), the husband has broken part of the agreement, when desertion commences. In *Fitzgerald* v *Fitzgerald* (4) there were special facts, as the separation was due to the action of the wife. In this case, the separation was expressly of a temporary character and desertion commenced, when on the expiration of the agreement the husband refused to co-habit with the wife. The defendant did not give any evidence before the magistrates as to his inability to support his wife.

THE LORD CHIEF JUSTICE:—In my judgment the decision of the magistrates was right. The question of

(1) 49 & 50 Vict., c. 52
(2) [1899] P. 42
(3) [1914] 3 K.B. 160
(4) 1 P. & D. 694
(5) 1 P. & D 713
(6) 2 P & D. 25
(7) 20 Q.B.D. 76
(8) [1891] 2 Q.B. 418
(9) 39 I.L.T.R. 210
(10) 29 T.L.R. 673

want of means is out of the case, as the point was not raised in the Court below, and I do not propose to consider it here. The only question for decision is whether it was possible for the defendant to desert his wife in view of the facts which have been proved. It is clear, from the authorities cited, that there was not, and could not be, any desertion until the agreement entered into between husband and wife in 1920 had expired. But when the period fixed by that agreement had elapsed, the wife was entitled to call for her rights. This resembles *De Laubenque* v. *De Laubenque* (1), where Sir F. H. Jeune, President, asks, "Can there be desertion where there has never been co-habitation? If a married couple separate at the church door is desertion possible?" It seems to me that where a right to co-habitation exists, the legal effect is the same as if co-habitation had in fact taken place. If the defendant in this case has refused to co-habit with his wife, he is guilty of the same offence as though he had co-habited with her for some time and then ceased to do so. We accordingly answer the question put to the Court in the affirmative and give the plaintiff her costs.

WILSON J. : I concur.

Solicitor for plaintiff : *T. E. Conaghan.*
Solicitor for defendant : *Bernard Campbell.*

(1) [1899] p. 42

A.A.C.

C.A.
1925
Nov. 23

1926
Jan. 12

[IN THE COURT OF APPEAL.]

# MAGUIRE v. DAY (1)

## (1925. No. 1061).

*Landlord and Tenant—Lease—Spirit Grocery—Covenant by Lessee to use premises as a Spirit Grocer's and Beer Retailer's shop and to maintain the Spirit Grocer's Licence attached to the premises—Non-renewal of Licence—Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 Geo. 5, ch. 12), s. 2.*

By an indenture of lease made in 1901 M. M demised to J. R. certain premises described as "all the messuage, shop, and dwelling house known as No. 4, Dawson Street, in the City of Belfast, for a term of 1970 years. The lease contained covenants by the lessee to use the premises as a spirit grocer's and beer retailer's shop or as a public house or inn, and to preserve the spirit grocer's licence attached to the the premises, and not to do anything which might prejudically affect the licence or might cause the refusal of the renewal of the licence. There was a proviso for re-entry in the event of the lessee failing to observe the covenants. Subsequently the interest of the lessor became vested in the plaintiff, and that of the lessee in the defendant.

The defendant carried on the business of a spirit grocer in the premises until after the passing of the Intoxicating Liquor Act (Northern Ireland), 1923, and ceased to do so in January, 1924. In 1924, the renewal of the licence was refused on the ground that a "trade other than the sale of any intoxicating liquor or of table waters" was carried on, and compensation was subsequently awarded to the defendant by reason of the lapse of the licences.

In an action for recovery of possession of the premises, and for damages:—

*Held*, by the Court of Appeal (Moore C.J. and Andrews L.J.), reversing the judgment of Brown J., that as the defendant had brought about the refusal of the renewal of the licence by her own act, the plaintiff was entitled to judgment for possession and to damages for breaches of covenants.

APPEAL from the judgment of Brown, J., sitting without a jury, in an action for the possession of certain premises and for damages for breaches of covenant between the plaintiff Kate Maguire and the defendant Mary Day.

By indenture of lease of 23rd April, 1901, Margaret Mooney demised to James Ryan, spirit merchant, for a term of 1970 years at the yearly rent of £30 payable as therein, certain premises on the north side of Dawson

(1) In the Court of Appeal before Moore C.J. and Andrews, L.J.

Street, in the City of Belfast, as therein described, and also the messuage shop and dwelling house known as No. 4 Dawson Street, and the spirit grocers and beer retailers licences for the sale of liquors by retail to be consumed off the premises attached to the said shop and dwelling house and the bar fittings and fixtures thereon, etc.

The said indenture contained further covenants for repair, redelivery, insurance of the premises, for reinstatement, a covenant that the lessee would during the continuance of this demise only use the said messuage and premises and all improvements and additions to be made thereto and thereon as a spirit grocer's and beer retailer's establishment or as a public house or inn, a covenant on part of the lessee for maintaining the spirit and beer licences, a further covenant for their due renewal, and against doing any act or thing which might cause the forfeiture of the licences, and on the determination of the said lease to transfer the licences to the lessor; and the lessor was to have power to do any act in the name of the lessee to validate such intention to transfer. There was also the usual proviso for re-entry on breach.

Subsequently all the interest of the lessor became vested in the plaintiff, and that of the lessee under assignment of 8th March, 1915, became vested in the defendant. The defendant carried on the business as that of a spirit grocer in the premises until after the passing of the Intoxicating Liquor Act (Northern Ireland), 1923, and ceased to do so in January, 1924. She applied for a renewal of her spirit dealers' licence for the year ending September 30, 1924, and on 16th January, 1924, an Order was made by the Justices to the following effect, "Application refused on the ground that a trade other than the sale of intoxicating liquor or of table waters is carried on." Thereupon by virtue of such refusal defendant became entitled under Section 3 (1) of the Intoxicating Liquor Act, 1923, to claim for compensation, and she was subsequently awarded the sum of £1,228 by reason of the lapse of the licences the property of the lessor or her representatives, which the defendant was bound under covenant to maintain and preserve. She had also covenanted to do no act prejudicially affecting the existence of the licences.

C.A.
1925
Nov. 23

1926
Jan. 12

MAGUIRE
v.
DAY

The premises were closed, and no business is carried on in them. On 21st November plaintiff gave defendant notice under the provisions of the Conveyancing and Law of Property Act, 1881, Section 14 requiring her to remedy with other breaches of the foregoing covenants, and requiring compensation. Plaintiff subsequently brought the present action for recovery of possession of the premises, based on the non-compliance with the notice under the Conveyancing Act, and for damages, which was heard before Mr. Justice Brown, without a jury, on 26th June, 1925, who found in favour of the defendant and entered judgment accordingly.

The plaintiff appeal to the Court of Appeal.

*Megaw K.C.* and *McKean* for the appellant:—
Everything in this case turns on the lease itself. Part of our case before Brown J. was that part of the premises had been allowed to get into a state of complete disrepair. There was a beer-dealer's off licence and an excise licence for consumption off the premises. There was a covenant by the lessee only to use the premises as a spirit grocer's and beer retailer's shop, or as a public house or inn, and not to do anything which might prejudicially affect the licence. This is the main part of our case.

[MOORE C.J. As you have not appealed from the refusal of Brown J. to amend the pleadings, you are now restricted to the question of the licence.]

*Megaw K.C.* The defendant insisted on keeping on the spirit grocer's licence until it died, whilst it was her duty under section 2 (1) of the Intoxicating Liquor Act (Northern Ireland), 1923, to give up her grocery business in order to maintain the licence. On this ground alone, we submit there has been a breach of covenant.

A spirit grocer is defined by Section 81 of the Licensing Act, 1872, "as any person dealing in or selling tea, cocoa-nuts, chocolate or pepper, and having an excise licence to sell spirits by retail in any quantity not exceeding two quarts at any one time to be consumed elsewhere than on the premises where sold." A spirit grocer's licence is in fact an excise licence for consumption off the premises. The covenant does not really

require the carrying on of the grocery business. The defendant could have preserved the licence by giving up this part of her business. A spirit grocer is not necessarily a grocer. Section 9 of the Licensing Ireland Act, 1874, refers to spirit grocer's licences as excise licences. There was nothing to hinder the defendant from preserving these licences. The off-licence is given without the necessity for the sale of groceries at all. Section 2 of the Intoxicating Liquor Act (Northern Ireland), 1923, in no way abolished any licence. It simply enacted that in future no trade was to be carried on in licensed premises other than the sale of intoxicating liquor and table waters. To suggest that the Act of 1923 was intended to put an end to the spirit grocery business is going a great deal further than the Act provided. The respondent herself had put an end to the licence and incurred forfeiture. But for her act the old licence could have remained. The defendant was not compelled by the Act of 1923 to give up her licence. Although "abolition of certain off-licences is to be found in the marginal note, these words are not in conformity with the words of the section. The same old off-licence still remained.

[They also referred to *Reg (Donohue)* v. *Justices of Armagh* (1)].

*T. J. Campbell K.C.* and *Diffin* for the respondent:—

The respondent's obligation was to keep the licences alive. The lessee covenanted during the continuance of the demise only to use the premises "as a spirit grocer's and beer retailer's shop or as a public house or inn." *The King (Collins)* v. *Justices of Donegal* (2) decided that the holder of a spirit grocer's licence was not entitled to apply for a publican's licence. The Act of 1923 changed the whole position of the respondent. The respondent applied in 1924 for a renewal of her licence and was refused on the ground that she carried on a trade other than the sale of intoxicating liquor or of table waters. The landlord came before the Claims Tribunal and submitted to its jurisdiction; she has therefore, we maintain, lost her remedy. We submit that the dropping of the

(1) [1898] 2 I.R. 126 (2) [1903] 2 I.R. 533

C.A. 1925 Nov. 23

1926 Jan. 12

MAGUIRE v. DAY

grocery business by the defendant would have amounted to a breach of covenant. The Act of 1923 made a composite business impossible in the case of spirit grocers. We submit that there has not been any breach of covenant on the part of the respondent as the rights of the parties are reciprocal. The forfeiture of the licence does not mean the loss of the premises. Under the lease the lessee was obliged to pay a yearly rent of £30 for 1970 years. The landlord had chosen her tribunal and exhausted her claim to damages. We submit that the spirit grocer's licence ceased to exist by virtue of the operation of the Intoxicating Liquor Act (Northern Ireland), 1923, and that there was therefore no subject matter upon which the covenant could operate. Whoever is carrying on the trade is entitled to the compensation. It was held in *Grimsdick* v. *Sweetman* (1) that the non-renewal of the licence had not the effect of putting an end to the lease. If the Excise authorities are not satisfied they can refuse to issue the licence, *The King (McGlinchy)* v. *Greer* (2). It was held by Palles C.B. in *Reg (Donohue)* v. *Justices of Armagh* (3) that the applicant for a licence was under an obligation of being, at the time he applied for the licence, a person who dealt in the specified groceries or some of them, and of satisfying the Excise authorities of that fact. The decision of the Claims Tribunal is final, and the existence of the award is a bar to this action, *Royal Commission of Wheat Supplies* v. *Usher & Co., Ltd.* (4). We maintain that the landlord is in no way damnified in this case, and that the licence has been lost by Act of Parliament. The rights of the respondent are settled by the lease of 1901. By virtue of the lease the respondent had a right to carry on the grocery trade in the premises. We contend that the appellant has no right to read the words excise off-licences into this lease.

*Megaw K.C.* in reply.

*In Grimsdick* v. *Sweetman* (1) the landlord insisted on continuance. Both landlord and tenant had received compensation. That case has no application to the

(1) [1909] 2 K.B. 740
(2) 37 I.L.T.R. 156
(3) [1898] 2 I.R. 126
(4) [1920] 2 I.R. 483

C.A. 1926

MAGUIRE v. DAY

Jan. 12

question now at issue. It is only the Court which has discretion to grant relief from forfeiture. The Claims Tribunal has expressly disclaimed any dealing with the covenants.

*Cur. adv. vult.*

MOORE C.J. having stated the facts as above set out proceeded as follows:—Several topics of interest were argued before us, including the distinction between a spirit grocers' licence and "a licence for the sale by retail for consumption off the premises of spirits, wine, &c." as set out in Section 2 of the Intoxicating Liquor Act Reading on the nature of a spirit grocers licence will be found in the judgment of Barton J. in *In Re Cullen & Rialls contract* (1), where he held that a covenant by a lessee not to carry on the trade of a publican was not broken by his trading as a licensed spirit grocer on the premises, and this judgment contains references to other Irish authorities on the subject, some of which have been cited in argument before us.

But I cannot think this very material; it was for the licences demised to the defendant, whatever be the precise description of "spirit grocers' and beer retailers' licences for the sale of liquors by retail to be consumed off the premises;" that the defendant claimed compensation on failure to obtain their renewal, and it is not now open to her to say that Section 3 does not cover them.

The argument presented by Mr. Campbell for the defendant has narrowed itself down to this: True! he says, the licences have gone; they have gone in breach of the several covenants in the lease, but the defendant stands excused because they have gone under the provisions of an Act of Parliament, subsequent to the lease, abolishing them. (I should say here that I cannot find any special reference in the documents to the beer retailer's licence, but counsel in the argument have treated it as standing in like circumstances with the spirit grocer's licence).

Now what is the law about this? It is as old as Lord Raymond's Reports (1678) where Holt C.J. lays down the rule:—"The difference, where an Act of Parliament will amount to a repeal of a covenant, and where not, is this:

(1) [1904] 1 I.R at p. 206

C.A. 1926

MAGUIRE v. DAY

where a man covenants not to do a thing which it was lawful for him to do, and an Act of Parliament comes after and compels him to do it, there the Act repeals the covenant and vice versa, but where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an Act makes it lawful, the Act does not repeal the covenant." *Brewster* v. *Kitchen* (1).

This principle has been followed in many cases, notably in *Cunningham* v. *Dunn* (2) and so recently as in *Ralli Brothers* v. *Compania Naviera Sota Y Aznar* (3).

To apply this to the present case—the defendant was bound by covenant to maintain, &c., and further " not to do any act which might prejudicially affect the said licences for the time being in force or future licences or which might cause the refusal of the renewal for the time being in force :" did the Intoxicating Liquor Act, 1923, compel her by a change in the existing law to break this covenant? If it did so she is excused, if it did not she is liable for breach.

This question is raised by par. 5 of the defence. [His Lordship read it.]

What then is the true construction of section 2 of the Intoxicating Liquor Act, 1923. I disregard the marginal note, "abolition of certain off-licences," as not having any legislative effect. *Sutton* v. *Sutton* (4). The section is purely negative. It does not abolish the grant or renewal of retail licences for consumption off the premises. It merely provides that, after the 30th September, 1924 (subject to extension in certain cases), such shall not be granted in respect of any premises in which or in any part of which any other trade save the sale of table waters is carried on : and the section proceeds to make it unlawful for any licenced person to carry on such other trade on the premises.

Surely this is not abolition of the licence, what compulsion is there to forfeit? Up to 1869 the only person entitled to obtain from the Excise authorities a spirit grocer's licence was a person duly licensed to trade in coffee, tea, chocolate, cocoa, nuts or pepper : a definition continued in the Licensing Act of 1872, section 81, with-

(1) Ld. Raymond, p. 317, 321
(2) 3 C.P.D. 443
(3) [1920] 2 K.B. 287
(4) 22 Ch. Div. p. 513

out the word "coffee." This was a condition attached to the person by way of qualification for the licence. It was in no sense an aboltion of the licence In my opinion all that section 2 of the Intoxicating Liquor Act, 1923, did was to impose a new and differing condition, viz. that the applicant to be qualified for a licence must not carry on any other trade on the licensed premises. Complying with this restriction the licencee of an off licence is just as much entitled as before the Act to a renewal of the licence in the ordinary way, and subject to the ordinary objections. For all we know the defendant would have obtained her renewal merely by discontinuing any other trade carried on by her on the premises.

I consider that she was bound to do this in order fully to perform the covenants binding her.

It is an obvious inference that she was captured by the idea that she would be enabled to receive an award by way of compensation for the business she was carrying on under the landlord's licence.

But how can we say that she was in any way compelled by the Act to do anything which would involve the sacrifice of the licence? She deliberately disqualified herself for the holding of a licence under the Act by continuing, after it was passed, to carry on some other trade; and by doing so she has deprived the lessor and her representative, the defendant, of his property which she was bound by covenant to maintain.

In *Grimsdick* v. *Sweetman* (1), where the licence was compulsorily abolished and both lessor and lessee obtained compensation, the term was held to continue notwithstanding: there the lessor sought to enforce the covenant for rent: in the present case where, as I hold, the lessee procured the refusal of the renewal by her own act, different considerations apply, and I think the lessor is within her legal rights in taking steps to determine the whole relationship by re-entry.

I entertain no doubt from the facts before us, that the licence was the valuable part of the property, and therefore the real security for the rent. Although defendant would not give up the other business in time to prevent the refusal to herself of the licence she did so immediately after the decision. In all human probability she will not

(1) [1909] 2 K.B 740

C.A. 1926

MAGUIRE v. DAY

continue to pay the £30 a year for premises producing no income, and it is always in her power to escape liability as assignee of the lease, by assigning over to a pauper: and the lessor loses both rent and licence.

I have not considered the question how far plaintiff may be disentitled to proceed now on breaches of covenant, by reason of the fact that she too applied for compensation in the Claims Court, because if this is relied on as a waiver of breaches, it has neither been pleaded nor argued before us: but it is stated that the order (which is not in the Appeal Book) made in her case was expressly made without prejudice to her rights against defendant, and it may well be that plaintiff has a sufficient answer in law and on the facts to this suggestion that she has waived the breaches of covenant complained of.

I think there should be judgment in the action for the plaintiff, and in any event the defendant should pay the costs both of action and counter-claim when taxed and ascertained. We allow the appeal with costs. As to the counter-claim, we have not been given any opportunity of considering the position as regards the respective values of the licence and the remainder of the premises demised, nor do we know what proposals are likely to be made by the defendant in the event of our being willing to grant her relief upon terms. We both think that the lessor should be fully indemnified by the lessee in respect of the wrongful acts and breaches of covenant committed by the latter. If the defendant so desires we will let the question of the counter-claim stand over to a day when we can determine the matter.

ANDREWS, L.J. The plaintiff seeks to enforce her right of re-entry under the lease of 23rd April, 1901, on the ground that the defendant has been guilty of a breach of covenant in not preserving and maintaining the spirit grocer's and beer retailer's licences attached to the demised premises, and in doing something which has prejudicially affected the said licences. The defendant pleads, in answer to this claim, that the said licences have been lost, not through any act or default on her part, but by reason of the provisions of the Intoxicating Liquor

Act (N.I.), 1923, which, it is contended, abolished these licences, and, by destroying the subject matter of the covenant, rendered its performance impossible.

The principle of law underlying this plea is too well settled to admit of argument. Where perfomance of a covenant, or, indeed, of any contract, has been rendered impossible by an Act of Parliament subsequently passed, the covenantor or contractor is excused from its performance unless it clearly appears that he intended that his contractual obligation should continue notwithstanding any future change in the law. As there is no evidence of any such intention in the present case, the sole question to be determined is whether the proved facts bring the case within the plea, or whether on the contrary the loss of the licences must in law be attributed to the voluntary act of the defendant, because it could have been prevented by her.

I entertain no doubt that the latter alternative is the true one. It is necessary to consider briefly the law in regard to spirit grocer's licences, which has undergone several changes in the hundred years which have elapsed since the passing of the Excise Licences Act, 1825. Under section 4 of that Act, persons licensed to sell coffee, tea, etc., were deemed "grocers," and were entitled to take out a licence to retail spirits not exceeding two quarts at any one time to be consumed off the premises. The section brings out clearly the fact that a spirit grocer had really, so long as its provisions remained in force, two licences, the first what Palles, C.B., calls in *Reg. (Donohue)* v. *Justices of Armagh* (1), the "grocer's ordinary licence," the second what such grocer was entitled to as of right, the "the spirit grocer's licence." In 1869 the duty on the "grocer's ordinary licence" was repealed; but by section 15 of the Customs and Inland Revenue Duties Act of that year anyone who dealt in the classes of commodities requisite to constitute him a "grocer" under the Act of 1825 was declared to have the same rights as if he held such a licence. Section 81 of the Licensing Act, 1872, introduced a new definition of the term "spirit grocer" as a person dealing in or selling tea, cocoa-nuts, chocolate, or pepper, and having

(1) [1898] 2 I.R. at p. 129

C.A. 1926

MAGUIRE v. DAY

an excise licence to sell spirits by retail in any quantity not exceeding two quarts at any one time to be consumed elsewhere than on the premises where sold.

It will be observed that throughout the code the spirit grocer's licence is found to be in its essence simply an off-licence for the sale of spirits by retail, granted to a grocer who was formerly licensed to sell the specified commodities, or who, under the subsequent legislation, simply dealt in them. Thus, in my opinion, a spirit grocer's licence is properly referred to and designated in O'Connor's Justice of the Peace (1st Edit., p. 122) as "a spirit retailer's off-licence."

Has such a licence been abolished by the Act of 1923? Reliance has been placed in support of such a view upon both the title of the Act and the marginal note to section 2; but even if these could be relied upon for the purposes sought, they would not justify the sweeping conclusion contended for, as they indicate only the "abolition of certain off-licences." When examined closely, the section will be found simply to enact in effect that no retailer's off-licence for the sale of intoxicating liquor should be granted or remain in force after 30th September, 1923, in respect of any premises in which any trade other than the sale of any such intoxicating liquor or of table waters is carried on; and the section concludes with the prohibitive words that "from and after the said date it shall not be lawful for any person to carry on, in any part of any premises licensed for the sale of intoxicating liquor by retail consumption as aforesaid, any trade other than such sale or the sale of table water."

Thus the section does not abolish all off-licences. Its language clearly indicates the continued existence of some. What the section does, however, is to give effect to a change in the policy of the law as regards such off-licences, and to make the carrying on of trade in the premises, which, in the nature of a grocery, was formerly a condition of the granting of a spirit grocer's licence, a fatal disqualification to an applicant for an off-licence. Existing holders of spirit grocers' licences were therefore confronted with the fact that they might continue to be either grocers or holders of off-licences, but they could not remain both. They could exercise their option. If they decided to give up their grocery business

they were entitled to retain their licences. In this event they got no compensation, for the legislature deemed this unnecessary, recognising that they retained the most valuable part of their business. If, on on the other hand, they decided to retain their grocery business they lost their right to a renewal of their licences, and in this event became entitled to receive compensation under section 3 and schedule I., part II., of the Act.

This is sufficient to determine the case. So far as the Act of 1923 is concerned the defendant had an option. She could give up the grocery business or the licences. If she gave up the former she could comply with the covenant to preserve and maintain the two off-licences attached to the premises. This was her duty. If she retained the grocery she thereby abandoned her right to a renewal of the licences. This she conceived to be, and, judging by the amount of the compensation awarded, rightly conceived to be her interest, or, perhaps I should say, her immediate financial interest. The important point, however, for the present case is that it was not the Act of Parliament which abolished the licences attached to the demised premises, but the defendant's own choice and determination to retain the grocery. True, she went through the ceremony of applying to the Court for a renewal of the licences; but in the circumstances it was a mere form; and the ground of refusal of the application stated in the Orders, namely, that "a trade other than the sale of intoxicating liquor or of table waters is carried on," shows clearly that it was within the power of the applicant to remove this ground of disqualification and to obtain the renewal had she so desired. In these circumstances, the defence fails, and the plaintiff is entitled to judgment for possession.

Solicitor for the appellant: *Thomas Maguire.*
Solicitor for the respondent: *Joseph I. Donaghy.*

J. McC.

C. A.
1925
Dec. 16

1926
Jan. 25

[In the Court of Appeal.]

## HALL v. WIGHTMAN (1).

*Damage caused on highway by animal domitae naturae—Escape from unfenced lands of owner on to other lands and thence to highway—Absence of proof of negligence—Procedure—Death of defendant appellant after hearing and statement of case by Judge of Assize—Revivor.*

The plaintiff's motor car collided with a dark brown heifer belonging to the defendant which had strayed from the defendant's unfenced land and came suddenly out on to the highway at about 12-20 a.m. from the land of an adjoining owner; the motor car was overturned and the plaintiff sustained injury. There was no negligence in the driving or management of the motor car.

*Held* by the Court of Appeal (Andrews and Best L.J.J.) that there is no obligation on an owner of land adjoining a highway to fence his lands in such a manner as to keep his animals from straying on the highway, and there being neither nuisance nor negligence on his part the defendant was not liable to the plaintiff.

Subsequently to the hearing of the appeal by the Judge of Assize (Moore, then L.J.) and to the statement of the case and to service of the Notice of Appeal the defendant appellant died.

*Held*, that there was jurisdiction to revive the proceedings, and the Court of Appeal on the application of Counsel for the Executors of the defendant made an order for revivor. *Canning* v. *Farren* ([1907] 2 I.R. 486) approved and applied.

Case Stated. The question to be decided being whether on the facts set out in the case a decree granted by the County Court Judge of Down should be affirmed or reversed.

Plaintiff's claim was for damages sustained by him on 24th December, 1924, whilst driving in a motor car on the county road in the townland of Rosconnor, County Down, by reason of a cow, the property of defendant, which was straying on said county road, having collided with the motor in which plaintiff was driving, as a result of which plaintiff was injured, and for damages for injuries caused by negligence and breach of duty on the part of defendant.

The County Court Judge gave a decree for plaintiff and an appeal therefrom was heard by the present Lord Chief Justice at the Downpatrick Summer Assizes, 1925.

(1) In the Court of Appeal before Andrews, L.J. and Best, L.J.

From the case stated it appeared that plaintiff was an officer in the Special Constabulary on 24th December, 1924. On the date in question he left Hillsborough about 12-30 a.m. on duty to drive to Downpatrick. The car, at the material time, was being driven by one John Greer, and was going at a speed of from eighteen to twenty miles an hour. There were lights on the car, and the Lord Chief Justice found as a fact that there was no negligence in the driving or management of the car. After passing Annacloy cross-roads, shown on a map incorporated in the case, the car, when it had gone about forty yards, collided with a dark brown heifer, which came suddenly out from Magee's land (also shown on the map) to the road on plaintiff's right side. The collision caused the car to turn over, with the result that the injuries complained of were sustained. The heifer which thus came out was owned by defendant, and was one of seven cattle which were on the road during that night.

It was further found that defendant had put the cattle in question on his own land in the field on the map edged around with a yellow tint, and that they were all there at 4-30 p.m. on 23rd December, 1924. Between the field of defendant in which the cattle had been placed and the point on the road where the collision occurred there are two or three fields belonging to Magee. There was a gap in the hedge between defendant's field and one of Magee's fields, and the fences between the road and Magee's field, which immediately adjoins the road, had many gaps or weak places.

The Lord Chief Justice was of opinion that defendant was guilty of creating or permitting a nuisance by allowing the cattle to be a source of danger on the highway in the circumstances aforesaid, and was about to affirm the decree of the learned County Court Judge, but at the request of Mr. McSparran, who appeared for the defendant, agreed to state a case for the opinion of this Court The question for the Court is whether or not on the foregoing facts the decree should be affirmed or reversed. The Lord Chief Justice finds that the amount awarded, if the defendant be liable, is reasonable.

The appeal was heard on 25th July, 1925, the case stated is dated 29th July, 1925, defendant died on 31st

C.A. 1925 Dec. 16

1926 Jan. 25

HALL v. WIGHTMAN

August, 1925, and probate of his will was on the 4th day of November, 1925, granted to the Reverend Samuel M. Shaw and William H. Shaw, the executors named in said will.

*Pringle K.C.* and *McSparran* for the defendant:—

We apply to have the suit revived as against the executors. Under R.S.C., 1905, Order 17, Rule 4, the action survives. We rely strongly on *Canning* v. *Farren* (1) which covers every case it is distinctly stated of every appeal. We submit that *Canning* v. *Farren* (1) is an authority which should be followed in the present case.

*Hume* for the plaintiff:—

*Canning* v. *Farren* (1) is not an authority for the proposition contended for here, and does not govern the present case. I rely on the dissenting judgment of Wright J. in that case, and suggest that the case should not be followed to the extent urged by Mr. Pringle.

[The Court reserved judgment on the preliminary point as to whether the proceedings could be revived, and and decided that the argument should proceed.]

*Pringle K.C.* and *McSparran*:—

There is no duty cast upon the owner of land adjoining a highway to fence his land so as to keep his cattle off the highway. In *Higgins* v. *Searle* (2) it was held that an owner of cattle straying on to the highway was under no liability for an accident occasioned thereby to a person using the highway. To the same effect are *Jones* v. *Lee* (3), *Ellis* v. *Banyard* (4), *Heath's Garage Limited* v. *Hodges* (5), *Cunningham* v. *Whelan* (6). *Howard* v. *Bergin O'Connor & Co.* (7) does not touch the present case. We submit that a single animal straying upon the public road does not constitute a nuisance.

Is is not a natural consequence of an animal straying on the road that there should be an accident. The defendant is not the owner of the lands adjoining the highway. If the contentions on behalf of

(1) [1907] 2 I.R. 486
(2) 100 L.T.R. 280
(3) 106 L.T.R. 123
(4) 106 L.T.R. 51
(5) [1916] 2 K.B. 370
(6) 52 I.L.T.R. 67
(7) [1925] 2 I.R. 110

the plaintiff were to prevail, owners of cattle grazing near the roadway would be insurers of motor vehicles.

*Hume* for the plaintiff :—

The present case is distinguishable from *Heath's Garage Limited* v. *Hodges* (1). I suggest that the defendant is clearly liable for the straying and obstruction which took place at night. In *Heath's Garage Limited*, v. *Hodges* (1) the obstruction occurred in daylight, and that case should not be followed, as it is inconsistent with the principle laid down, *Fletcher* v. *Rylands* (2). *Cox* v. *Burbidge* (3) was a case of viciousness pure and simple. In *Higgins* v. *Searle* (4) there was a specific finding of no negligence. I submit that the correct principle is laid down in Halsbury, Vol. 16, p. 151, Section 265 : " It is a nuisance at common law either to neglect any legal duty in respect of a highway, or to hinder or prevent the public from passing freely, safely and conveniently along it, unless such prevention or hindrance is justifiable as an exercise of rights reserved by the dedicating owner, or as an ordinary and reasonable exercise of the rights of a passenger or frontager thereon, or under statutory powers." In *Cunningham* v. *Whelan* (5) Molony L.J. said at p. 63 : " It is, I think, clear that while, in ordinary circumstances, an owner is not bound to prevent his cattle or other domestic animals from straying on the highway, he is bound to use such care or caution that they will not stray in such numbers so as to render the highway positively unsafe or dangerous to those who use it. If he omits to do so, and allows his cattle to wander or be there, it is a breach of duty on his part, and if that breach is the proximate cause, he is liable." *Turner* v. *Coates* (6) is an authority in my favour.

I submit that it is the duty of the owner of cattle to confine them to his own lands. The fact that there was other land between his land and the road does not relieve an owner of cattle of his liability.

[He also referred to Addison on Torts, 8th edition, p. 309, and Garrett on Nuisances, 2nd edition, p. 181.]

*Cur. adv. vult.*

(1) [1916] 2 K.B. 370
(2) L.R. 3 H.L. 330
(3) 13 C.B. (N.S.) 431
(4) 100 L.T.R. 280
(5) 52 I.L.T.R. 67
(6) [1917] 1 K.B. 670

C.A. 1926

HALL v. WIGHTMAN

Jan. 25

ANDREWS, L.J. This matter comes before us on a Case Stated by the Lord Chief Justice (then Lord Justice Moore) at the last Summer Assizes for the County of Down.

The plaintiff, who is an officer in the Special Constabulary, left Hillsborough on duty about 12.30 a.m. on 24th December, 1924, to motor to Downpatrick. There were lights on the car, and the case finds that there was no negligence in its driving or management. Near Annacloy cross roads it collided with a dark brown heifer which came suddenly out on the road from the land of a man named Magee on plaintiff's right. The car was overturned and the plaintiff sustained injury

The heifer was the property of the defendant, and was one of a bunch of seven head of cattle belonging to the defendant which were on the road during that night. The defendant was subsequently fined for allowing the heifer to wander on the public highway contrary to 14 & 15 Vict., c. 92, S. 10 (11).

The case further finds that the defendants had put the cattle in a field of his own which did not adjoin the public road, and that they were all there at 4.30 p.m. on the afternoon before the accident; that there was a gap in the hedge of this field through which the cattle escaped into Magee's lands, which lay between the defendant's farm and the road; and that Magee's fences had many gaps or weak places.

The plaintiff brought a civil bill based on nuisance and negligence and obtained a decree from the County Court Judge of £45. The Lord Chief Justice held that if the defendant was under any obligation to fence his lands so as to keep his cattle on them he was guilty of negligence by allowing the gap to remain open. He was further of opinion that the defendant was guilty of creating or permitting a nuisance by allowing the cattle to be a source of danger on the highway; and he states that he was about to affirm the decree, when, at the request of the defendant's counsel, he agreed to state a case, the question for the Court being whether on the foregoing facts the decree should be affirmed or reversed.

Subsequent to the hearing before the Lord Chief Justice and to his stating the case, the defendant and appellant died; and on the application to continue the

proceedings in the name of the defendant's executors, the objection was raised that the proceedings had abated and could not be revived. In my opinion on this point the case is ruled in principle by the decision of the majority of the Court in *Canning* v. *Farren* (1), in which it was held that where, on an appeal from a decree of the County Court Judge to the Judge of Assize under 45 & 46 Vict., c. 29, s. 4, the appellant or respondent dies after notice of appeal but before the hearing, there is jurisdiction in the Judge of Assize to adjourn the appeal to enable a personal representative of the deceased to be added to the record, and, upon this being done, there is jurisdiction to hear and determine the appeal. The matter came before the King's Bench Division on a case stated by Gibson, J., and the authoritative character of the decision lies in the fact that the judgment read by Lord O'Brien was stated by him to be the joint judgment of himself, Palles, C.B., and Andrews, Madden, and Boyd, JJ., the only dissenting judgment being delivered by Wright, J. There appear to me to be only two points upon which an attempt could be made to distinguish that case from the present. There it was the respondent who died; here it is the appellant. There the death occurred before the appeal came on for hearing; here it occurred after the appeal had been argued and the case stated by the Judge of Assize. When the judgment of the majority of the Court is carefully read and the grounds of the decision considered, it will be found that neither point of distinction creates any difference of principle. Indeed, it is to be observed that Gibson, J., held the view, in which I respectfully concur, that the case is a much clearer one in favour of the power of revivor if the death occurs, as in the present case, after the hearing by the Judge of Assize and pending the decision, which, as he points out, might be adjourned for a special case or otherwise; for either a complete appeal having been domiciled in the High Court, the Judicature Rules might apply, or there might possibly be a remedy if the Assize order could be ante-dated in the names of the original parties, the adjournment being the act of the Court.

It would be mere waste of time for me to examine the

(1) [1907] 2 I.R. 486

C.A. 1926

HALL v. WIGHTMAN

several sections of the Acts of Parliament to which Lord O'Brien referred in the judgment which he read. Suffice it to say, that the Legislature contemplated a hearing of, and an adjudication upon, every appeal by the Judge of Assize, for without it there would be no such final determination as is contemplated by the statutes, the decree of the County Court Judge having lost its character of finality by the due and valid service of a notice of appeal. The suit is not dead because it is abated; it is suspended only, and is capable of being revived; and I respectfully concur in the concluding words of the judgment, which are sufficiently general to cover this case, that there is jurisdiction in the Judge of Assize to hear every appeal, whether there has been a partial or total abatement, and jurisdiction to decide it on its merits, and to give effect to his decision by directing the issue of execution.

Since writing the above my attention has been directed to the judgment of the Privy Council delivered by Lord Buckmaster in *Wing Lee* v. *Lew* (1), in which the power of the Courts to revive proceedings on death pending the hearing of an appeal is well illustrated.

The only doubt which I entertain is whether the order reviving the suit should be made by this Court or by the Lord Chief Justice, upon which point I would refer to the differing opinions of the Court of Appeal in Ireland in *Davoren* v. *Wooton* (2). As, however, it was not contended before us that we had no jurisdiction to make the order if a power of revivor exists, I think, whilst not expressing any final opinion upon the point, that we should not hesitate to make the order themselves and thus save further needless expense to the parties.

Passing now to the principal question in the case as to the plaintiff's right to recover damages, an action such as this grounded on negligence and nuisance must be clearly distinguished from one brought in trespass. *Ellis* v. *The Loftus Iron Co.* (3) illustrates the general liability of the defendant when his animal, though domitae naturae, trespasses without negligence on the plaintiff's lands. The extent of his liability is such damages as are the natural and direct consequence of the trespass committed. Thus he is liable for the grass they eat and

(1) [1925] A.C. 819
(2) [1900] 1 I.R. 273
(3) L.R. 10, C.P. 10

trample upon, though not for any injury to the person of others; for, as pointed by Blackburn, J., in *Fletcher* v. *Rylands* (1), " our ancestors have settled that it is not the general nature of horses to kick or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man he will be answerable for that too." On this general law of trespass an exception has been grafted that where cattle or other like animals, whilst being lawfully driven along a highway trespass from it upon unfenced land immediately adjoining, the owner of the land must bear the loss unless he can prove negligence on the part of the owner of the animals, *Goodwyn* v. *Cheveley* (2). It is a risk, which the owner of land adjoining a highway must bear, rendered absolutely necessary for the conduct of the ordinary affairs of life.

Passing now from cases of trespass, the first case which naturally arises for consideration is where damage is caused on a highway by animals of the character referred to whilst being lawfully driven upon it. It is well settled in such a case that the owner is not responsible without proof of negligence on his part (see Judgment of Stephen, J., in *Tillet* v. *Ward* (3).

The last case which we need consider is where cattle or other like domestic animals escape from the lands of their owner on to the public highway and thereon cause damage to persons or property lawfully on the said highway. It is clear that in such case trespass would only lie at the suit of the owner of the adjoining lands as against some one who was, or whose animals were, making such user of the highway as was in excess of the right of the public to pass and repass along it for the purpose of legitimate travel. Any member of the public, who possesses no property in the soil but who suffers injury whilst lawfully using the highway, can only succeed if he establishes the existence of negligence or nuisance on the part of the defendant, and further that the injury complained of was the direct and natural consequence of such negligence or nuisance. A proper appreciation of these principles will in my opinion fully explain and reconcile the decisions in all the cases cited to us in argument.

(1) L.R. 1 Ex. 265 at p. 280 (3) 10 Q.B.D. 17 at p. 21.
(2) 4 H. & N. 631

C.A. 1926

HALL v. WIGHTMAN

In *Cox* v. *Burbridge* (1) the defendant's horse strayed on the public highway and kicked a child; yet it was held that the defendant was not liable, as the horse was a domestic animal regarding which there was no evidence that it was accustomed to kick mankind: there was no proof of negligence; and, even if there had been, the injuries, in the absence of evidence of scienter, would not have been the natural consequence of such negligence. In *Hadwell* v. *Righton* (2) the Court of King's Bench, consisting of Phillimore and Bray, J.J., rested their decision in favour of the defendant on *Cox* v. *Burbidge* (1). As the plaintiff, who was riding a b cycle on a highway, got abreast of some fowls belonging to the defendant, a dog belonging to a third person frightened the fowl, one of which flew into the spokes causing an accident. The Court held that in the absence of anticipated danger there was no negligence; and, further, that even if there were negligence in allowing the fowl to be on the road, the circumstances in which the accident happened prevented the damage from being the natural consequence of its presence there.

It becomes necessary for us next to consider what constitutes negligence on the part of the owner of straying animals. Negligence is a breach of duty; and without duty there can be no negligence. For this reason it has been laid down in a series of cases that the owner of land adjoining a highway is not guilty of negligence by reason of his failure to fence his lands in such a manner as to keep his animals from straying on the highway; for, as Bankes, J., pointed out in *Jones* v. *Lee* (3), there is no common law duty so to fence one's lands. In *Ellis* v. *Banyard* (4) the doctrine thus enunciated by Bankes, J., was approved of "There is," said Buckley, L.J., "at common law no obligation on the part of the owner or occupier of land who depastures cattle near a highway to provide any fences so as to prevent the cattle from getting into the highway." Many years before the decision in that case, Bramwell, B., said in *Goodwyn* v. *Cheveley* (5), "A person is not bound to

(1) 13 C.B.N.S. 431
(2) [1907] 2 K.B. 345
(3) 106 L.T. 123
(4) 106 L.T. 51
(5) 4 H. & N. 631

fence his land,'' and Pollock, C.B., expressed the same opinion. It may well be that the time has arrived when, with the altered character of highway traffic consequent upon the introduction of the modern motor car, the old principle of the common law should yield place to a new principle dictated by or at least more consonant with the necessity for greater precautions in the interest of the public safety; but this a matter for legislation, not for Courts of Justice, whose duty is to administer the law as it exists rather than as they conceive it ought to be. Until such legislation has been passed those who use the roads must take them as they find them, even though the risks of accident due to the presence of animals upon the highway have been incalculably increased since the advent of rapid motor traffic. That this is our duty is apparent from the judgment of the English Court of Appeal in the recent case of *Heath's Garage Ltd.* v. *Hodges* (1), where a unanimous Court reaffirmed the principle that an owner or occupier of land adjoining an ordinary highway is not bound to fence it so as to prevent harmless animals like sheep from straying upon the highway. In that case, in circumstances similar to those of the present case except that the accident occurred by day instead of by night, and with the findings of fact, including some special facts, in their favour, the plaintiffs' action was dismissed, the Court expressing the opinion that the defendant owed no duty to the plaintiffs as members of the public using the road, to keep his sheep from straying upon it, and that the accident was not the direct and natural consequence of the breach of any such duty. '' An animal like a sheep, by nature harmless, cannot,'' said Lord Cozens Hardy, M.R., '' fairly be regarded as likely to collide with a motor car, and the owner of the sheep cannot be held liable on that footing.'' Further, Pickford, L.J., expressed the opinion in unambiguous language that there is no distinction in principle between the case of such an animal as a sheep or a cow obstructing a vehicle in the dark and one obstructing it in daylight.

It has been suggested that the law in this country is different from what it is in England, and that we ought

(1) [1916] 2 K.B. 370

C.A. 1926

HALL v. WIGHTMAN

not to follow *Heath's Garage case* (1). I am unable to find anything to support this view. The common law is the same in both countries, and it is common law rights which we have to consider. Moreover, any such contention is answered by the judgment of the late Lord Chief Justice of Ireland (then Molony, L.J.), who, in the case of *Cunningham* v. *Whelan* (2), recognised and referred with approval to the judgments of the Court in *Heath's Garage case* (1).

It is no doubt true that in *Cunningham* v. *Whelan* (2) the Lord Justice held the plaintiff entitled to a decree, but it is important to note the grounds of his decision. He fully agreed with the English Court of Appeal that the owner or occupier of land adjoining an ordinary highway is not bound to fence it; accordingly, an action in negligence will not lie. The case before him was not, however, one in which a single or a very small number of animals was found straying on the road; there was a mass of no less than 24 bullocks and heifers without anyone in charge of them; and, as the facts proved, it was the dense mass of animals which, by their combined force, caused the plaintiff's cart to overturn and occasioned the injury to the plaintiff. The accident was, as the Lord Justice said, the result of the 24 animals, not one or two, being there together. That such a state of facts may well present an entirely different legal aspect from the case of a single animal was well recognised in *Ellis* v. *Banyard* (3), to which I have already referred. Thus Vaughan Williams, L.J., at p. 52, says:—" At the same time I am far from saying that it is impossible that a man should be sued for putting his cattle in such a place or position that the natural result is that they go out of that place or position, and, if in large numbers, obstruct the highway and cause damage to those who use it." Kennedy, L.J., in the same case, said he would be slow to infer that the law as to a harmless cow or sheep applied to " crowds of cattle whose mass might constitute an obstruction to travellers along the highway."

In my opinion, there is a clear distinction in law between a mass of cattle congregating on the

(1) [1916] 2 K.B. 370
(2) 52 I.L.T.R. 67
(3) 106 L.T.R. 51

highway and merely one or two such animals being on it. By their number they inevitably constitute an obstruction and so cause an nuisance, whereas in the case of one or two animals there is no necessary obstruction; whether they cause such or not depends entirely upon their own action or will. Accordingly, in the case of a mass of cattle, it may reasonably be said that they constitute a nuisance, and that it is the natural and direct consequence of such nuisance that injury results to a person lawfuly using the highway.

When considering the terms of the Case Stated after the argument my colleague and I felt some doubt as to the exact position of the cattle at the time of the accident. It appeared clear that the plaintiff's motor car collided with one animal only, and it seemed to us on the principles which I have just enunciated that it was a matter of considerable importance whether the other six cattle were in one of the fields or on the road at the time of the accident, and, if on the road, whether they or a substantial number of them could fairly be said to have been so close to the brown heifer with which the plaintiff collided as collectively to constitute a single obstruction to the approaching motor. Counsel on both sides have very fairly informed us that, whether the other cattle were on the road at the moment of the accident or not—a point on which there is, after the lapse of six months, room for legitimate difference of recollection—they did not constitute any actual obstruction to the motor, as it was only a short time after the accident that the plaintiff became aware that there were any other cattle in addition to the one with which his motor collided. In these circumstances I am of opinion that the plaintiff has not established the existence of a legal nuisance, and further that the accident was not the natural and direct consequence of any nuisance. On this latter point I would wish only to add that the facts of this case are infinitely stronger than were those of other reported cases; for, whilst it may reasonably be expected that animals grazing in fields with defective fences immediately adjoining the highway may wander on to the highway and thereon cause damage, I think it would be straining the ordnary meaning of language to say that it was the direct and natural consequence of the defendant putting seven head of cattle

C.A. 1926

HALL v. WIGHTMAN

in a field situated a considerable distance from the public road that they would not only stray through a gap in the fence dividing his field from his neighbour's, but that they would also wander over at least two fields belonging to such neighbour, and through a gap in his field adjoining the road and thereon cause an obstruction and damage.

I should say in conclusion that the provisions of s. 10 (11) of the Summary Jurisdiction (Ireland) Act, 1851, which is directed against swine or other beast being allowed to wander on the public road, have not escaped my attention. This section does not in express terms compel lands to be fenced, as the straying of beasts may be prevented by other means, such as herding. Its provisions are similar to those of the English Highway Acts, 1835, sect. 74, and 1864, sect. 25. They are all penal in character, and none of them was intended to impose any civil liability in respect of animals trespassing on the highway.

For these reasons we must answer the question submitted to us by saying that the decree of the County Court Judge should in our opinion be reversed, and the Civil Bill dismissed with costs and expenses as in the Case Stated mentioned. We allow £15 15s 0d costs of the hearing in this Court.

BEST L.J. having stated the facts as above set out proceeded as follows:—

Mr. Pringle applied to have the suit revived as against the executors and relied on the case of *Canning* v. *Farren* (1).

I am of opinion that *Canning* v. *Farren* (1) was rightly decided, and although not binding on this Court that its principle should be adopted in this case and that the suit should be revived against the executors of deceased defendant

The main question is, whether, in the circumstances already set forth, defendant should be held liable in damages for the injuries sustained by the plaintiff. Many cases were cited to us in argument, but I do not think it necessary to review them, having regard to the analysis of them made by my colleague in which I respectfully concur.

(1) [1907] 2 I.R., 486

The defendant was not bound, even if his land had adjoined the public highway, to fence it so as to prevent harmless animals like cattle from straying upon the highway.

The case of *Heath's Garage Limited* v. *Hodges* (1) was strongly relied on by defendant's counsel. In that case the plaintiffs' motor car was being driven upon a highway in daylight at a rate of from sixteen to twenty miles an hour and the driver saw in front of him on the road a number of sheep unattended; he put on his brakes, and almost immediately thereafter two sheep, which had apparently been left behind by the others, jumped from a bank on the side of the road, and one of them ran into the car and caused it to be overturned and damaged. The sheep belonged to the defendant, who was subsequently prosecuted and fined under Section 25 of the Highway Act, 1864, for having allowed the sheep to stray on the highway. In an action for damages in the County Court the Judge found that the sheep escaped on to the highway from the defendant's field through gaps in a defective hedge; that it was the natural tendency of sheep which were untended to run across or otherwise endanger vehicles in the road; that it was a matter of common knowledge that when sheep find themselves separated from the bulk of the flock they have almost a mania for rejoining it, perfectly regardless of intervening traffic; that the defendant had been guilty of negligence, or had committed a nuisance, in allowing the sheep to stray on to the highway; and that the accident was the natural consequence thereof. He accordingly gave judgment for the plaintiffs. This decision was reversed by the Divisional Court (Avory and Lush, J.J.) on the ground that even assuming there was evidence of negligence or of a nuisance committed by the defendant in allowing the sheep to stray on the highway yet, there being no evidence of a vicious or mischievous propensity on the part of the sheep within the meaning of the decided cases, the accident was not the direct and natural consequence of such negligence or nuisance.

The Court of Appeal (Cozens-Hardy, M.R., Pickford, L.J. and Neville, J.) held, affirming the decision of the

(1) [1917] 1 K.B. 670

C.A. 1926

HALL v. WIGHTMAN

Divisional Court, that the defendant was under no duty to plaintiffs, as members of the public using the road, to keep his sheep from straying upon it, and that the accident was not the direct and natural consequence of the breach of any such duty.

Mr. Hume, for the plaintiff, very ingeniously tried to distinguish the present case from the foregoing by suggesting that there was a new fact in the present case, viz., that the accident had taken place in the darkness of night. In this he was not quite accurate, for the case of *Turner* v. *Coates* (1), the foal case, arose out of matters that happened during the darkness. But whether the accident happened during light or during darkness I do not think that any man could be expected to foresee that the direct and natural consequence of his putting cattle on his own land, separated from the public road by two or three fields of his neighbour's, would result in a collision between one of those cattle and a motor car which was being driven along the road. The burden on owners of harmless animals would be unreasonable if, in the circumstances mentioned, such owners were to be held liable in damages.

I refrain from saying to what conclusion I might have come if the facts had been that the cattle were so massed on the highway as to form an obstruction and as a result thereof damage had accrued to the plaintiff. This state of facts is commented on by Vaughan Williams, L.J., in *Ellis* v. *Banyard* (1), and appears to have been the ground of the decision of Molony, L.J. in *Cunningham* v. *Whelan* (2).

In my opinion in the present case we ought to answer the question put to us by saying that the defendant is not liable, and that the decree given against him should be reversed.

Solicitors for the appellant: *Bell & Co.*
Solicitors for the respondent: *Johnstone & McCourt.*

J. McC.

[INTHE COURT OF APPEAL.]

C. A.
1925
Dec. 11

# CANTRELL AND COCHRANE LIMITED

v

# NEESON (1).

*Bailment—Mineral Water Bottles—Possession—Ownership—Trover and Conversion.*

The plaintiffs sold mineral water in bottles branded with their name. The course of dealing with customers was to invoice the bottles at a deposit rate of two shillings per dozen, and when bottles were returned the customers were credited in full. Where bottles were not returned the customers were debited with a charge for them, the plaintiffs usually accepting half the deposit rate for missing bottles where a deficiency was found to exist.

The defendant, a dealer, who had obtained possession of 48 dozen of the plaintiffs' branded bottles, refused to deliver them to the plaintiffs.

On the hearing of an appeal from a dismiss by the County Court Judge of a Civil Bill claiming damages for trover and conversion,

*Held*, by Andrews L.J., reversing the dismiss of the County Court Judge and granting a decree for £2 8s 0d, that the transaction was in law a bailment in which bare possession of the bottles vested in the borrower the true ownership remaining in the lender.

APPEAL from a dismiss pronounced by the Acting County Court Judge of County Antrim of a civil bill claiming damages for trover and conversion of 100 dozen bottles branded with the plaintiffs' name which they allege to be their property. The defendant admitted his possession of 48 dozen such bottles; and, as the proceedings were in the nature of a test action, the plaintiffs were willing to reduce their claim to this figure.

The plaintiffs are a firm of Mineral Water Manufacturers. The defendant is a dealer, who, having obtained possession of the bottles, was anxious to sell them to the plaintiffs. The latter refused to purchase, and demanded delivery up to them of the bottles, alleging that they never sold them, or in any way parted with their property in them. The plaintiffs' demand and the defendant's refusal to deliver up possession are admitted; and the only question for decision was in whom the property in the bottles was vested.

Mr. Scolfield, one of the plaintiffs' directors, proved that all the plaintiffs' bottles are purchased through him.

(1) On appeal before Andrews, L.J.

C. A. 1925

CANTRELL & COCHRANE LIMITED v NEESON

The present price of such bottles, branded with the plaintiffs' name, is 1/9 per dozen, a figure which is, however, subject to ordinary market fluctuations. The invariable practice of the plaintiffs when selling their mineral waters is, he says, to send an invoice with the goods in which it is expressly declared that the bottles are the exclusive property of the plaintiffs and cannot be purchased; and that the amount charged opposite them represents a deposit only which is credited or refunded on their return. Mr. Scolfield added that neither he nor any member of his firm ever sold any of the plaintiffs' branded bottles, and that their course of dealing with customers was simply to invoice the bottles to them at a deposit rate of 2/- per dozen, which, he asserted, was really only a book-keeping charge. When the bottles are returned they are credited in full. On the other hand, when they are not returned, if the plaintiffs find the customer's bottle account of such proportions that possibly he has not in stock the bottles debited against him, the plaintiffs have stock taken of the bottles in his possession, and, if a deficiency is found to exist, a settlement in the nature of a compromise is arrived at, the plaintiffs usually accepting half the deposit rate for the missing bottles. On cross-examination Mr. Scolfield said that accounts for bottles might remain outstanding for a lifetime; that he could not identify the particular bottles in the defendant's possession or say anything as regards them apart from the general practice deposed to; that he couldn't say that the bottles in the defendant's possession might not be bottles regarding which such a compromise had been effected with a customer. He further added that sometimes traders return plain bottles instead of the branded bottles to the plaintiffs, who might accept odd bottles in this way, but that such bottles would only amount to about 1/50th of 1%.

*Murphy, K.C.* (*M'Dermott* with him) for the plaintiffs: On the evidence it is clear that the plaintiffs have never parted with their property in their branded bottles at the time the contents of such bottles are sold to customers, nor has anything been proved which would prevent the plaintiffs from now asserting their title. Acceptance by the plaintiffs of a sum from a customer in satisfaction of the amount of deposit due by that customer in respect of

lost bottles cannot affect a sale of the bottles concerned or take the property in them out of the plaintiffs, for such an arrangement only fixes the amount to be forfeited for failure to return to the plaintiffs their own property and is not either in form or reality the determination of a price. There is nothing in such an arrangement or in any of the evidence to suggest that the plaintiffs ever abandoned their ownership in a single branded bottle.

*M'Gonigal, K.C.* (*M'Sparran* with him) for the defendant:

We object to the evidence given for the plaintiff. The invoice is not evidence except it be proved that it was sent with the actual bottles in the defendants' possession. It is necessary to look at the reality and not at the mere form of the transaction: in its essence the contract was one of sale and purchase and not a mere loan: see *Hutton* v. *Lipper* (1) and *Senecal* v. *Pauze* (2). Property passes from the plaintiffs to their customers, at the latest, when customers have been compelled to settle their outstanding bottle account or when a plain bottle has been accepted by the plaintiffs in place of one of their branded bottles. The plaintiffs have not proved that the bottles in defendant's possession were not the subject of such a settlement or exchange and their case therefore fails.

ANDREWS, L.J., having stated the facts as above, proceeded:—

It is right to say that the greater part of Mr. Scolfield's evidence was objected to by Mr. McGonigal, who appeared for the defence. He contended that the invoice was not evidence against his client unless it were proved definitely, and without reference to general practice, that an invoice was sent with the actual bottles in the defendant's possession, which it was obviously impossible for the plaintiffs to do as all the bottles are so identical in character that the plaintiffs cannot identify any of them as having been sent to any particular customer. Mr. McGonigal's objection also extended to the witness' evidence that his firm never sold any branded bottles, and to the course of dealing which the witness proved in regard to invoicing

(1) 8 A.C. 309 (2) 14 A.C. 637

C. A. 1925

CANTRELL & COCHRANE LIMITED v NEESON

the bottles at a deposit rate. Indeed, it may be said he objected to all evidence which would throw any light upon the first matter which I have to determine, namely, whether the plaintiff sell the bottles containing their mineral waters to their customers, or whether they merely lend them to their customers and retain the property in themselves. In my opinion Mr. M'Gonigals objection fails, though there might well have been considerable weight in his submission as to the inadmissibility or insufficiency of evidence of general practice if he could have shown that the practice deposed to was not universal. I consider that the evidence was legally admissible; and I am satisfied that these bottles left the plaintiffs' possession under the conditions of the general practice referred to.

Mr. McGonigal in the next place contends that it is my duty to look at the reality and not at the mere form of the transaction, and that in its essence the contract regarding the bottles is one of sale and purchase as distinguished from mere loan. He relies upon the fact that the customers are debited with 2/- per dozen for bottles, for which the plaintiffs only pay 1/9. I entirely agree with Mr. McGonigal that it is my duty to get behind mere form and to look at the real nature of the transaction. Thus it was held in *Hutton* v. *Lipper* (1), that where the real effect of a transaction is to transfer property for a certain price, the transaction will be deemed to be a sale, although it may be called a guarantee or agency. Conversely a document agreeing to transfer property on payment of a specified sum will not be treated as an agreement for sale if it can be shown that so to treat it would be contrary to the real intention of the parties, *Senecal v. Pauze* (2). I am entirely unable, however, to accept the argument that there is anything to be found in the more or less fortuitous circumstance of the difference between the purchase price and the deposit rate of the bottles which overrides every other circumstance and makes it incumbent on me to hold that what is obviously intended to be a loan or deposit is really a sale. The reality of the transaction is in law, in my opinion, a bailment commodatum, in which a bare possession of the goods as distinguished from the property in them vests in the borrower, the true ownership remaining in the lender.

(1) 8 A.C. 309 (2) 14 A.C. 637

Mr McGonigal further argues that, even if the property in the bottles does not pass from the plaintiffs to their customers at the time of the sale and delivery of the mineral waters, it subsequently passes in the case of those bottles which have not been returned, either when customers have been compelled to settle their outstanding bottle account, or when a plain bottle has been accepted by plaintiffs in place of one of their branded bottles; and he submits that as the bottles in defendant's possession may have been the subject of such a settlement or exchange the plaintiffs have not proved their case. In this connection it is not unimportant to note that the defendant, who alone could say where and how he obtained possession of the bottles, has remained out of the witness box; and, if it were necessary to do so, I would hold that when once the plaintiffs had given evidence which satisfied me that none of the bottles were sold by the plaintiffs at the time of delivery to the customers, they had established a sufficient prima facie case, and the burden of proof was shifted from the plaintiffs to the defendant, to prove that the bottles sued for were some of the relatively speaking very small number in respect of which such a settlement or exchange had been effected.

It is, however, unnecessary for me to decide the case on this ground, for I entirely agree with the decision of the English Court of King's Bench consisting of Avory and Rowlatt, J.J , in *Barlow and Company and Others* v. *Hanslip* (1) which appears to me to govern the present case. Though that case is unreported, Mr. Murphy has furnished to me since the hearing certified copies of the judgments, and I have also had the advantage of perusing a copy of the notes of His Honour Judge Woodfall, with which I have been favoured from the Royal Courts of Justice. In that case there were six selected plaintiffs whose practice as regards deposit differed in certain respects, some, indeed, imposing no deposit at all. But the Court did not attempt to draw fine distinctions, being satisfied that all plaintiffs had alike proved the fact cardinal to their success, namely, their property in the bottles. The case of the defendant Hanslip, a marine store dealer, was in one respect more meritorious

(1) Reported in note to this case post, p. 113.

C. A. 1925

CANTRELL & COCHRANE LIMITED v NEESON

than that of the present defendant, for he went into the witness box and established to the satisfaction of the Court that he had honestly and in good faith acquired possession of the bottles by purchase from dustmen and scavengers in the ordinary course of his trade. In the case of certain of the plaintiffs the same facts were proved as are so strongly relied upon here for the defence, namely, that where bottles were not returned the customer was debited in his accounts with a charge for same, which, it was contended, showed that there was a sale of the bottles to the customer.

I ask myself, as did Avory J., at what moment of time is it suggested that the sale in such circumstances takes place. Obviously not when the bottles are delivered full to the customer, and what is called a deposit is recorded in the plaintiffs' books. This bargain did not in strictness give the customer even the option of keeping the bottles and of paying forfeit or deposit for them. Any attempt on the part of the customer to dispose of them, otherwise than by returning them to their lawful owner, could have been restrained by injunction. A loan accompanied by deposit or guarantee for safe return confers no right on the borrower to transfer the goods or any property therein to a third party. Can it then be said that there is a sale when the customer fails to return the bottles and either the amount specified as deposit or a reduced sum by way of compromise is charged against him? It may be, as His Honour Judge Woodfall appeared to think, the so-called deposit is in reality a guarantee, or it may be, as Avory J. thought, that the debit which is made against the customer when he fails to return is in the nature of a charge for hire or of damages for non-return of goods which have been lent. In neither case would a settlement on such a basis effect a change in the property any more than would a judgment for damages for breach of contract to return the bottles within a reasonable time. It is of vital importance to the plaintiffs in the carrying on of their business that their branded bottles should be returned to them, rather than that they should remain in free circulation with the opportunities which would thereby be afforded to persons of passing off mineral waters of inferior quality as the plaintiffs' goods. This is obviously what the plaintiffs aim at in the compromise settlements, which, the

evidence shows, are occasionally effected by the plaintiffs with their customers, as they do not charge the real value of the bottles, but only a sum sufficient, in their view, to make it in the customer's interest to return the bottles to them.

It may be said that if any of the bottles sued for in this case were the subject of a settlement the plaintiffs, when they recover the bottles, will have received more than they are entitled to. That may be so, but it is no concern of the defendant; for any payment in respect of them was made not by the defendant, but by the customer; and as Mr. Justice Rowlatt points out in his judgment, it is no answer to the claim of plaintiffs who are entitled to possession as against a stranger that part of the interest in the goods sought to be recovered is outstanding in another person.

For these reasons I am of opinion that the dismiss of the Acting County Court Judge must be reversed and a decree granted for £2 8s 0d with costs in both Courts, the said decree not to issue, save for costs, if the defendant returns the bottles to the plaintiffs within one week from this date.

Solicitor for plaintiff: *George L. Maclaine & Co.*
Solicitor for defendant: *John P. M'Cann.*

A.A.C.

NOTE.

Royal Courts of Justice,
17th May, 1916.

IN THE HIGH COURT OF JUSTICE,
KING'S BENCH DIVISION,

Before:—

Avory and Rowlatt, JJ.

BARLOW & COMPANY & OTHERS v. HANSLIP.

Mr. C. F Vachell, K.C., and Mr. S. H. Emanuel appeared for the Appellant, the Defendant.

Mr. J. B. Mathews, K.C., and Mr. J. H. Harris (for Mr. Trapnell) appeared for the Respondents, the Plaintiff, instructed by Messrs J. N. Mason & Co.

MR. JUSTICE AVORY: This case raises a question which has been ripening for decision for many years past within my own

experience. Ever since the institution of these bottle exchanges there have been from time to time threats that the question would ultimately have to be decided. It has now come to be decided, and has been decided before the learned County Court Judge in this case. The short point is this brewers and mineral waters manufacturers are in the habit of purchasing for use in their trade bottles with their names embossed or otherwise stamped upon them They send out their manufactured goods in these bottles to their customers under an arrangement by which they charge the customer, in some instances a deposit so much per dozen on the bottles. In such case where they charge a deposit on the bottles the customer is debited with that charge when the bottles go out; he is credited with it when the bottles are returned, and if he fails to return any of the bottles then he is debited for the balance which he fails to return. In other cases, of which there are examples here, the brewer or mineral water manufacturer makes no charge for deposit, but, if the bottles are not returned then he does debit his customer with a charge, either a nominal charge, or, as in the case of one of the plaintiffs here, namely, Barlow, he debits him with the cost price to him the brewer or manufacturer of the bottle. I think that description practically covers the case of all the plaintiffs here. For the purpose of restoring to their owners those bottles which often, from various causes, go astray, that is to say, they are retailed to customers who do not in their turn return them to the public-house, or to the grocer, or they get broken or lost in other ways—in order to effect a restitution of those bottles to their rightful owners these bottle exchanges, societies, or companies, or whatever they are called have been instituted Their system is to collect or to receive bottles which are sent in by persons who happen to have in their hands bottles belonging to others. The mineral water exchange, or the bottle exchange, sort them out and return them to their rightful owners on payment of a small sum to those who are subscribers, and a little increased sum to those who are not subscribers.

That being the way in which this business is done there arises the question whether the property in those bottles ever has passed from the brewer or the mineral water manufacturer. If it has then they are not entitled to recover those bottles from any third person into whose hands they have passed. In this case the defendant happens to be a marine store dealer, into whose hands these bottles have come, we assume, perfectly honestly in the course of the trade If the property in these bottles never has passed from the plaintiffs then they are entitled to recover. That is really the whole question which the learned County Court Judge had to decide.

He has found in all cases that the property never did pass. He has heard the evidence from representatives of each of the plaintiffs and he has found that the property never did pass—that they never parted with their property in the bottles. There

was evidence before him in each case identifying the bottles which were claimed as being, or I will say for the moment, as having been the property of the different plaintiffs, and it is complained that the learned County Court Judge has not made a distinction between some of the cases, and particularly the case of Barlow and of Clayton, which it is suggested stand upon a different footing. Therefore I will say a word about those separately. With regard to all the other plaintiffs, I am content to say there was evidence showing that the plaintiffs had never parted with their property in these bottles, and that those which were in the possession of the defendant were identified as being their property by these plaintiffs. With regard to Barlow the distinction is said to be this, that the witness who was called, having first of all said, 'We never sell our bottles and we do not charge a deposit," said later in his evidence, "We charge actual cost to us of the sized bottles, if there is a shortage we send in a money account and we charge the actual cost to use of the size bottle." That means, amplified as it appears by the shorthand note, that although no deposit has been charged, if the customer fails to return the bottles then he is debited with the cost price to Barlow of the different sizes of the bottles. It is suggested that that shewed that there was a sale of the bottle to the customer. I am at a loss to know at what moment of time it is suggested the sale took place. It is clear that it does not take place when the full bottles are delivered to the customer and I cannot appreciate how it can be said that there is a sale to the customer at the time when he fails to return, because he is charged with the cost price of the bottle. It appears to me that the arrangement with Barlow is quite consistent with the view which applies to all the other plaintiffs, namely:—that this charge which is made to the customer—the debit against the customer when he fails to return—is in the nature of either of a charge for hire or it is in the nature of damages for non-return of goods which have been lent. Therefore I think the case of Barlow should not be distinguished.

With regard to Clayton, a little complication is introduced into that by the fact that it appears that at some time during 1914 an action was brought by Claytons against a man named Ward who had purchased a quantity of their manufactured goods in bottles

MR. MATHEWS: My Lord, the Writ was issued on the 28th August, 1015.

MR. JUSTICE AVORY: Very well. It was for goods sold.

MR. MATHEWS: It was under an agreement of the 15th August, 1914.

MR. JUSTICE AVORY: Yes, I had seen the date somewhere. The action was brought in 1915 against Ward, to whom a quantity of manufactured goods had been sold in bottles, and he had failed to return the bottles, I think 1,700 dozen was the quantity. In that action the plaintiffs recovered, as appears by the judgment,

£140. It does not appear by the judgment whether it was in default of return, whether it was a judgment in detinue, or whether it was a judgment for damages under a contract to return the bottles. It is said that the fact that the judgment was obtained shows that Claytons had lost their property in the bottles, and that it might have been that the six bottles which were claimed from the defendant in this case might possibly be six of those bottles which formed the subject of the action against Ward. Of course, it is just possible that they might be. I do not decide the case of Clayton on the ground that those bottles were or were not a portion of those included in the action against Ward. It appears to me to be sufficient to say that the judgment does not show that it was a judgment in detinue or in trover, and it is quite consistent with that judgment that it was in the form of damages for a breach of contract by Ward to return the bottles. If it was that then it would not change the property, and the prima facie evidence given by Clayton arising from the fact that these bottles in the possession of the defendant bore their name was not, in my opinion, displaced in any way by the production of this judgment. For these reasons I think the learned County Court Judge was right and that this appeal must be dismissed.

Mr. Justice Rowlatt: I am of the same opinion. The matters stand thus; the plaintiffs, in order to prove their title to the bottles, gave evidence that the bottles in question respectively belonged to them in the first instance, and added, as it was necessary for them to do, that they had never parted with any of them. Now that was insufficient proof if it turned out that in fact they had parted with some of them. Therefore the question arises whether, under the system which has been discussed, the plaintiffs did part with the property in the bottles.

It is perfectly clear to my mind, and I do not think it has been disputed at the Bar, that the original bargain between the plaintiffs and their customers was not a bargain which gave the customer the option of keeping the bottles and paying the forfeit, or deposit, or whatever it may be called. The customer had no option, he was bound to return them, and if was purposely not returning them the plaintiffs could, by legal means, have compelled the customer to return them; and if he was purposing to dispose of them elsewhere they could have stopped him by injunction, and it would not be an answer to say; I tender you the deposit. When he fails to return them—assuming he cannot return them—something has prevented him, such as his customers have not returned them to him, or something has happened to them, then he pays the deposit or the forfeit or the sum, and the question then arises whether upon the payment of the deposit or the forfeit or the sum—I will not delay the matter to determine which it is—the plantiffs' property ceases. Mr. Vachell says that the plaintiffs' property was abandoned at that moment. What does he mean by "abandoned?" Does he mean the plaintiffs got rid of their property by abandoning it and making the article anybody's property; or does he mean they abandoned

it by conveying the property to someone else. It makes all the difference in the world. If you throw a thing away you abandon your property, and anybody can pick it up and keep it even as against the Crown; but if you transfer it to somebody else then you transfer the property, and if somebody else is not forthcoming then the Crown occupies his position until he does come. It is quite clear the abandoning must be one of those two.

Now did the plaintiffs desire to get rid of their property in the sense of throwing it away and making it anybody's property? That is utterly unsupportable. There is no evidence of any such intention at all. Then did they, by virtue of the transaction, convey their interest, whatever it was, to those persons who paid them the sum in question? Except in the case of Barlow they did not pay the full amount. They charged a sum which was sufficient, in their view, to make the customer try to return the bottle, or want to return the bottle, but it was not the real value of the bottle, and everyone knows as a matter of business it is the desire of the plaintiffs, the brewers, that their bottles should not go out into foreign hands but should come back to them. Therefore I think the true effect, as it seems to me, of the arrangement which was made, subject to Barlow's case which I will deal with in a moment, clearly was that the plaintiffs, by taking this sum, did not transfer their interest to the customer from whom they took it.

In Barlow's case they happen to have taken a sum which is a little more significant perhaps in favour of the defendant than in the other cases, because they charged the actual cost to themselves of the bottles, but still having regard to the general business of these people and the fact that it was the actual cost, which is not the actual value, of course, I do not think really that the case differs, or that there is such a substantial difference that it ought to affect the result

I am bound to say with regard to Clayton & Co.'s case I felt a little more difficulty, and I still feel some, because if the judgment was in trover it passed the property, and if it was on contract the contract was alleged to be very like paying for the bottles in the statement of claim; but the matter is so very nice, or so very thin altogether, and the number of bottles are so extremely small, that I am not going to complicate this case by going into that.

There is one other point I ought to mention because Mr Vachell mentioned it. Mr. Vachell says that the marine store dealer in this case is entitled to credit, in reduction of the damages, in respect of the penny or twopence or three-halfpence, or whatever it may be, which has been, we will assume, paid by the original customer of the brewer to the brewer for not returning his bottle. Now see how that is put. Mr. Vachell means that the defendant has an interest in the bottle to the tune of one penny, and that the plaintiffs have only the other interest. That is not so, Mr. Vachell's client has not paid the penny. The penny was paid

by the customer, and it may be that the customer has a pennyworth of interest in the bottle, but that is no answer, because it is well known old law that a person entitled to possession as against a stranger is entitled to recover the whole value of the chattel even although part of the interest may be outstanding in another party. I think, if I am not wrong, that it is otherwise if the person against whom the action is brought has an actual interest in the thing; he can take the benefit of it, but as against the customer I think he certainly cannot. So I agree that the appeal fails and must be dismissed.

As Solicitors for the Plaintiffs we certify that this is a true copy of the transcript of the Shorthand Writer's Notes.

Dated this 7th day of January, 1926.

(Signed) J. N. Mason & Co.,
41-49 Temple Chambers, Temple Avenue, E.C.4.

As Junior Counsel appearing in this Case both at the hearing at the Westminster County Court and at the subsequent hearing before the Divisional Court I hereby certify that as far as I am able to remember this is a true copy of the Judgment of the Court and is in accordance with the endorsement on my Brief which has to-day been produced to me.

Dated this 7th day of January, 1926.

(Signed) J. G. Trapnell.

IN THE MATTER OF AN APPLICATION UNDER THE TOWN TENANTS (IRELAND) ACT, 1906.

C. A. 1926

Feb 9 10.

[IN THE COURT OF APPEAL.]

# McFARLAND AND TALBOT v. MONTGOMERY (1).

*Town tenant—Compensation for improvements—Tenant not in physical occupation of premises—Town Tenants (Ireland) Act, 6 Edw. 7, c. 54—Landlord and Tenant (Ireland) Act, 23 & 24 Vict., c. 154—Landlord and Tenant (Ireland) Act, 33 & 34 Vict., c. 46—Land Law (Ireland) Act, 44 & 45 Vict. c 49.*

On a claim for compensation for improvements made under the Town Tenants (Ireland) Act (6 Edw. 7, c. 54) by a tenant not in physical occupation of the demised premises at the expiration of his term, *Held*, that the applicant was not a tenant as defined by Section 18 of the Act, *Byrne* v. *Meath* (42 I.L.T.R. 43) followed and approved.

Appeal from the Recorder of Londonderry under Section 11 (b) of the Town Tenants (Ireland) Act, 1906. The applicants, Lady McFarland and Miss Elizabeth S. Talbot, were the lessees of certain premises in Londonderry held under a lease of 69 years from November the 1st, 1855, and made by Sir Robert A. Ferguson to William McArthur. The term expired on the 1st November, 1924, whereupon the premises became vested in the present respondent, Captain F. J. Montgomery. The applicants in 1921 during the term had sub-let the premises in different portions to three sub-tenants—one upon a yearly letting, and two upon tenancies, for an unmentioned term, but liable to determination at a half-yearly notice. These sub-tenants went into occupation under their respective contracts of tenancy and carried on business in the several parts so let to them. All that remained in possession of the applicants was a passage way which the sub-tenants all used.

Upon the expiration of the lease the applicants entered into negotiations with the landlord for a renewal, but these fell through, and new leases were made direct by the respondent to the three parties in occupation.

The applicants alleged that improvements on the premises to the value of £3,525 13s 4d had been made by them or their predecessors in title, and presented a

(1) In the Court of Appeal before Moore, C.J., Andrews and Best, L.J.J.

C. A. 1926

McFarland & Talbot v Montgomery

claim before the Recorder of Londonderry for compensation for these improvements under the Town Tenants Act, 1906. The learned Recorder dismissed the claim on a preliminary objection, raised by counsel for the respondents without hearing any evidence. He held, that assuming the improvements were made by the applicants, or their predecessors in title, they were not now entitled to claims for them under the Act of 1906, because they were not themselves in actual possession of the premises.

*Murphy K.C.* and *McCoy* for the applicants:—

The case turns on the definition of "tenant" in Section 18 of the Act. That definition was considered in *Byrne* v. *Meath* (1), where it was decided that a mesne landlord was not entitled to compensation. This course was followed in *Porter* v. *Pigeon* (2). These were both County Court cases not binding on this Court. In the Town Tenants Act "landlord" is to have the same meaning as in section (1) of the Landlord and Tenant (Ireland) Act, 1860. But a complete definition is given to the word "tenant" in section 18:—"Tenant" shall mean the person entitled to any lands under any lease or other contract of tenancy." The latter definition may include even remaindermen. In the Land Law (Ireland) Act, 1881, section 57, "tenant" is defined as a person occupying land under a contract of tenancy. By that narrower definition actual occupation by the tenant is required. But this definition was not used in the Act of 1906, though very suitable if the Act intended to require actual occupation. This was overlooked by the County Court Judge in *Byrne* v. *Meath* (1). There is a clear distinction between (a) "a person entitled in actual possession to" and (b) "a person entitled to actual possession of": see *in re Augustein* (3). The word "entitled" implies legal rights, the right to get possession. The purpose of the Act is to compensate a lessee for improvements he has effected; it would be inconsistent that a lessee should be deprived of benefit because he had not ended his sub-tenancies before his lease expired. Why should the landlord of a lessee

(1) 42 I.L.T.R. 43.
(2) 46 I.L.T.R. 16
(3) [1895] 2 Ch. 883

whose sub-tenancies have not been terminated be in a better position than the landlord whose lessee remains in possession? Section 4 of the Act does not apply in this case, as the improvements were not made by the sub-tenants; that section enables a sub-tenant who has effected improvements to make a claim for compensation against the mesne landlord who in his turn is enabled to pass on the burden to the head landlord: *Carroll* v. *Keayes* (1). The basis of the Act is to prevent a head landlord from obtaining the benefit of improvements without paying for them. Section 5 applies only to occupying tenants who are quitting their holding, and provides that in addition to compensation for loss of good-will and for expenses of removal, he can claim for any improvements he may have effected.

*Leech K.C.* and *Dougherty* for the respondent:—

It is the purpose of the Town Tenants Act,, 1906, that a tenant occupying buildings in a town should not be deprived of them without compensation. Two classes are provided for by the Act:—(1) a tenant in actual occupation who has made improvements: (2) a sub-tenant in occupation who, having improved, claims against the mesne landlord who by section 4 is enabled to pass the burden on to the head landlord. The definition of "tenant" in the Landlord and Tenant (Ireland) Act, 1860, was not adopted because it was too wide, and it was desired to restrict the definition to occupation. Throughout the Act the phrase occurs "quitting his holding," which implies actual physical occupation up to the moment of eviction. Section 1 sub-section (2) and section 2 sub-section (1) clearly refer to the last person in occupation. There is nothing in the Act giving a mesne landlord a right to compensation for improvements except where a claim has been made against him by the actual occupant. "Actual possession" is equivalent to "actual occupation": see the definition of "possession in Stroud's Judicial Dictionary and Furlong on Landlord and Tenant at p. 40: see also *McCarthy* v. *Conners* (2), and R.S.C. ord. 9, rules 10, 11 and 12, and *Murray* v. *Thorniley* (3).

(1) Ir. Rep. 8 Eq. 97
(2) 28 I.L.T.R. 137
(3) 2 C B. 217

C. A. 1926

McFarland & Talbot v Montgomery

The Act is entitled " An Act to improve the position of Tenants of Certain Houses, Shops or other Buildings in Ireland," and this obviously refers to actual occupiers. If the definition of " tenant " in section 18 were intended to include a mesne landlord, it should have continued " and entitled to receive the rents and profits." This was purposely left out and the word " actual " added to " possession " with the intention of excluding the mere right of the mesne landlord to get possession. There cannot be two people in actual possession of the same holding. A mesne landlord has only himself to blame and cannot complain of hardship if he has not ended his sub-tenancies before his own term expires. Why are the words " at the end of his term," as in section 4, not used in section 1 where it is " on quitting his holding?"

*McCoy* in reply.

In the Landlord and Tenant (Ireland) Act, 1870, particularly in section (20) and throughout the Act the phrase " quitting his holding " obviously refers to tenants other than those in physical occupation and " tenant " does not exclusively mean " occupying tenant." In section 4 of the Town Tenants Act the change of wording to " at the end of his term " does not restrict the meaning of " quitting his holding " as used in the Act because of the reference at the end of the section to " occupying tenant," showing that " tenant " as defined in section 18 has a wider meaning than a mere " occupying tenant."

Their Lordships called on Leech K.C. to reply to the argument based on the wording of section 20 of the Landlord and Tenant (Ireland) Act, 1870.

*Leech K.C.*

The analogy sought to be drawn from section 20 of the Act of 1870 is upset by the definition given of " tenant " in section 70 of that Act which is much wider than the definition in section 18 of the Town Tenants Act. In both Acts the phrase " quitting his holding " means a physical quitting by some one, but in the later Act the phrase used in reference to tenants not in physical occupation is " at the end of his term."

Moore C.J. having stated the facts as above set out proceeded

This is an interesting point which, so far as we are aware, comes now before a Superior Court for the first time. It has been argued before us that the applicants are entitled to succeed in their claim, because although not in actual occupation of the premises they are in actual possession of the rents and profits thereof and are therefore within the definition of " tenant " in section 8 of the Act, and are accordingly entitled to compensation.

During the arguments we have been referred to the statute and to those sections of it which expressly refer to the Landlord and Tenant (Ireland) Act, 1860, and to the Land Act of 1870; Land Law (Ireland) Act, 1881, and the Public Health Act of 1878; but in my opinion on its true construction the Town Tenants' Act must be construed by itself, as it stands, without reference to any other statute not therein directed to be read with it, and we are confined to its four corners; nor are we entitled to apply cases in which the definition of " tenant " is considered in relation to other statutes. For instance, *Martin Estates Co., Ltd.*, v. *Watt & Hunter* (1) a previous decision by this Court, in which the distinction between occupation and possession was considered, cannot be of any assistance to us as it depends upon the construction of the Increase of Rent and Mortgage Interest Restrictions Act, 1920. Turning, however, to the Act itself, the definition " tenant " in section 18 reads as follows:— " 'Tenant ' shall mean any person entitled in actual possession to the holding under any contract of tenancy for a year or for any longer period, whether the interest of such tenant shall have been acquired by original contract, lawful assignment, bequest, devise, or act and operation of law."

What does that mean? Are the present applicants, who have a right to receive the rents and profits, covered by it? I think in construing the statute some guidance is afforded by the words of the title. It is " An Act to improve the position of Tenants of certain Houses, Shops, or other Buildings in Ireland." If one of the sub-tenants in the present case carried on business as a butcher, could

(1) [1925] N.I. 79

C. A. 1926

McFarland & Talbot v Montgomery

it be said colloquially that the applicants were tenants of a butcher's shop? So far as the trade is concerned they are landlords, not "tenants," and the Act relates to business" and "residence," or both in the occupied holdings. This is clear from section 17. The holding must be "occupied either for residential or for business purposes, or partly for residential and partly for business purposes." I think the Act is limited to "occupying" tenants. The term "occupying tenant" appears in section 4, and it is when such a tenant makes a claim for compensation that the machinery of the Act is set in motion.

I hold that the true meaning of section 18 is found if we merely transpose the words as follows:—"'Tenants' shall mean any person in actual possession entitled to hold under any contract of tenancy."

By section 4 of the Act mesne landlords are given certain rights which they had not possessed before. Previously, when the reversion fell the landlord was entitled without compensation to receive the benefits of all improvements created in land. Under section 4 when the occupying tenant has made a claim for compensation against his mesne landlord, that landlord himself is entitled to claim compensation against his immediate lessor. Since the passing of the Act, therefore, such mesne landlord, if he has to pay compensation to the occupying tenant, is entitled to pass his claim on to the interest of those above him; this is a new and statutory privilege.

In these circumstances the applicants have not succeeded, in my opinion, in strictly proving their right to this privilege. I am not quite sure that I fully understand the facts in the case of *Byrne* v. *Meath* (1), where the decision of the County Court Judge appears to be concerned more with a parcel of land than a building; but assuming that that particular holding came within the statute, I quite agree that he was right in coming to the conclusion that the applicants must be "tenants" in occupation The learned Recorder followed this decision. In my judgment he was correct. My colleagues and I are of the opinion that the present appeal must fail with costs.

(1) 42 I.L.T.R. 43

Andrews L.J. I agree entirely with the judgment just delivered by the Lord Chief Justice, and only desire to add a few words. The whole difficulty in the case arises from the rather unusual grouping of the words in the definition of "Tenant" contained in section 18 of the Town Tenants (Ireland) Act, 1906:—"'Tenant' shall mean any person entitled in actual possession to the holding under any contract of tenancy for a year or for any longer period, whether the interest of such tenant shall have been acquired by original contract, lawful assignment, bequest, devise, or act and operation of law." The opening words of that definition—"any person entitled in actual possession"—are decidedly ambiguous. If it was the intention of the legislature to confer the benefits of the Act upon middlemen the definition of a tenant contained in section 1 of the Landlord and Tenant Act (Ireland), 1860, would have been much clearer. On the other hand, if it was intended to confine the benefit of the Act to actual occupiers, the definition of a tenant contained in section 57 of the Land Law (Ireland), Act, 1881 would have been more suitable. When, however, we turn to other parts of the Town Tenants' Act, 1906, for assistance we receive it in the first place from section 17, in which it is enacted that "the holdings to which the provisions of this Act . . . . apply are houses, shops and other buildings situate in urban districts, towns, or villages, and occupied either for residential or for business purposes, or partly for residential and partly for business purposes." This reference to the character of the occupation of the premises in this section which defines the holdings to which the Act applies indicates in my opinion a clear intention that the right of obtaining compensation should be confined to occupying tenants. I am also much impressed by Mr. Leech's argument that the phrase "quitting the holding," to be found in several sections of the Act, refers to a physical quitting as distinguished from a termination of the tenant's legal interest. Mr. McCoy detracted to some extent from the weight of this argument by referring us to section 20 of the Landlord and Tenant (Ireland) Act, 1870, where the same words are used in referring to the disturbance of a mesne landlord. In my opinion, how-

C. A. 1926

McFarland & Talbot v Montgomery

ever, it would be a very dangerous principle to admit that the same words must necessarily receive the same interpretation in different Acts of Parliament. The language of other sections may always be referred to for assistance in construing doubtful words or phrases; and in my opinion the use of the words " at the end of his term " in section 4 of the Town Tenants Act, 1906, which contains provisions relating to middlemen, shows clearly that the words " quitting the holding " when used in that Act refer to a cessation of physical occupation. It is undoubtedly true that this construction involves a possibility of hardship upon a person who has created sub-tenancies for short terms which are still subsisting at the expiration of his term. But everyone is presumed to know the law, and the hardship is more nominal than real if such a mesne landlord could have protected his rights and become entitled to receive compensation by determining the sub-tenancies in proper time.

Without this Act no one would be entitled to receive compensation. The onus lies on a claimant who seeks its benefits to prove that he comes within the Act. That onus has not been discharged by the present applicants. It is now twenty years since the Act was passed, and I, personally, have never known a case in which it was held that a mesne landlord could recover compensation. *Byrne* v. *Meath* (1) is not a decision of the High Court, but I think I am right in saying that it has hitherto been generally accepted in the professions as good law. I agree with the Lord Chief Justice that the Recorder of Londonderry was right in dismissing the application, and that this appeal should be dismissed with costs.

Best L.J.: I agree with the judgments already delivered. In my opinion the intention of the legislature in passing the Town Tenants' (Ireland) Act, 1906, was to give protection to occupying tenants only, with a certain exception in favour of mesne landlords to be found in section 4; and this exception only applies when a claim has been made against the mesne landlord by his occupying tenant. The expression " quitting his holding " in this Act means and implies physical

(1) 42 I.L.T.R. 45

quitting. In section 17 it is enacted that the Act applies to "holdings . . . occupied." In my judgment section 18, the definition section, implies physical occupation, and this is the meaning which must be attributed to it. I think that the decision of the Recorder of Londonderry should be affirmed and that the appeal should be dismissed with costs.

Solicitor for applicants: *Andrew Robb.*

Solicitor for respondent: *Crookshank, Leech and Davies.*

A. A. C.

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# IN THE MATTER OF
# JAMES LINDSAY, A BANKRUPT (1).

Nov. 27
1926
Feb. 5

*Bankruptcy—Crown debt—Unemployment Insurance and Health Insurance Contributions—Priority—Preferential payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict., c. 60)—Costs—Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30)—National Health Insurance (Northern Ireland) Act, 1924 (14 & 15 Geo. 5, c. 16)—Ministries of Northern Ireland (Northern Ireland) Act, 1921 (12 Geo. 5, c. 6).*

L. was adjudicated a bankrupt on 10th June, 1925. A claim was made by the Ministry of Labour against his assets (1) for four months' arrears due in respect of Unemployment and Health Insurance contributions as preferential payments under the Bankruptcy (Ireland) Act, 1889, (2) for further arrears alleged to be recoverable as Crown debts ranking next after the usual preferential payments. The Registrar in Bankruptcy allowed all the claims in full.

On an application by the assignee in bankruptcy to vary the Registrar's certificate as regards the second claim, it being admitted at the hearing that the application failed in respect of arrears of Unemployment Insurance contributions,

*Held*, by Brown J. that Health Insurance contributions were recoverable only as a civil debt and that the certificate must be varied accordingly.

*Held*, further, that the Ministry of Labour were liable to pay costs as they were claiming by virtue of their functions as Insurance Commissioners and not as a Crown department.

APPLICATION to vary the certificate of the Registrar in Bankruptcy.

The Ministry of Labour claimed (1) preferential payments of £1 6s 11d and 11/4, being four months' arrears of contributions in respect of Unemployment and Health Insurance. These amounts, a total of £2 18s 3d were not disputed. (2) £15 15s 11d arrears in respect of Unemployment and £7 8s 8d arrears in respect of Health Insurance contributions from 8th November, 1920, to 15th February, 1925. These amounts, a total of £23 4s 7d, were claimed as Crown debts and entitled to preference ranking next after the preferential payments allowed by the Bankruptcy Act, 1878. This claim was disputed by the assignee in bankruptcy.

*Dougherty* for the Ministry of Labour:—

As regards the £15 15s 11d due in respect of Unemployment Insurance arrears, this is recoverable as a Crown debt: see the Unemployment Insurance Act, 1920,

(1) In the King's Bench Division (Bankruptcy) before Brown, J.

section 22, sub-section (6), and *In re Galvin* (1) which clearly applies. As regards the £7 8s 8d due for Health Insurance arrears there is no direct authority, but the Ministry of Labour are a Crown Department and entitled to sue under the Ministries of Northern Ireland Act, 1921, section 2. The debt is due to the Ministry, as it has taken over the functions formerly exercised by the Insurance Commissioners.

*Warnock* for the assignee in bankruptcy :—

The claim is good as regards the four months' arrears and the further claim in respect of Unemployment Insurance contributions, but bad as regards the Health Insurance contribution. The Ministries of Northern Ireland Act, 1921, could only make this a Crown debt if it were so before. There is nothing in the Health Insurance Act, 1911, to make it a debt at all. There is simply a liability on employer and employee to contribute to a fund, not for the Crown, but for insurance purposes. By the Health Insurance (Northern Ireland) Act, 1924, section (3), arrears are expressed to be recoverable by civil proceedings. In the Unemployment Insurance Act, 1920, arrears are recoverable as a Crown debt. To make a debt a Crown debt, it is necessary to do so specifically.

BROWN J. :—I shall vary the certificate of the registrar by deleting the £7 8s 8d claimed in respect of the Health Insurance contributions. I shall give costs against the Ministry of Labour if Mr. Warnock satisfies me that I have power to do so. Feb. 5

[The question of costs was argued later.]

*Warnock* :—

By section (2), sub-section (1), of the Ministries of Northern Ireland Act, 1921, and the schedule of the Act there referred to, the functions formerly exercised by the Insurance Commissioners were vested in the Ministry of Labour. These proceedings were brought by virtue of that section. The Insurance Commissioners were always liable to have costs given against them, if unsuccessful: see *Irish Insurance Commissioners* v.

(1) Ir. Rep. [1897] 520

K.BD. Bky. 1925. Nov. 27.

1926 Feb. 5

Re LINDSAY

*County Council of Tipperary, South Riding* (1) and *Irish Insurance Commissioners* v. *Guardians of the Poor of Enniskillen Union* (2). Section 11 of the Telegraph Act, 1878, is a similar but weaker section: see *Postmaster General* v. *Great Southern and Western Railway Company* (3) where costs were given against a Crown department suing as a body corporate.

*Dougherty*:—

The rule as to costs in cases in which the Crown is concerned is that the Crown neither pays nor receives costs unless the case is governed by some special statute, or there are exceptional circumstances justifying a departure from the ordinary rule: *Johnson* v. *The King* (4). The Ministry of Labour is suing here as a Crown department making a public claim.

BROWN J.:—If this application had been brought elsewhere than in Northern Ireland it would have been brought against the Insurance Commissioners, who have always been liable to have costs given against them if unsuccessful. It is argued that here there is now a difference since the functions formerly exercised by the

Feb. 5

Insurance Commissioners are now performed in Northern Ireland by the Ministry of Labour. But by the Ministries of Northern Ireland Act, 1921, section 2 sub-section (1), it is enacted that "The Ministry shall be a body corporate . . . and shall be styled by the name set forth in the first column of the schedule to this Act and may sue or be sued by that name." That section is very similar to section 11 of the Telegraph Act, 1878, which was considered in the *Postmaster-General* v. *Great Southern and Western Railway Company* (3) where it was decided that the Postmaster-General was liable to pay costs. The present is a stronger case, because the Ministry of Labour is not before me as a Crown department but as carrying out the functions of the Insurance Commissioners. I am satisfied that the Crown is liable to pay costs in this case and accordingly order them to be paid.

Solicitor for the Ministry of Labour: *H H Mussen.*
Solicitor for the assignee: *G. McIldowie & Son.*

(1) 48 I.L.T.R. 211
(2) 51 I.L.T.R. 97
(3) 50 I.L.T.R. 137
(4) [1904] A.C. 817

C.A.
1925.

Dec., 3, 4,
16.

[IN THE COURT OF APPEAL.]

# THOMPSON v. REYNOLDS.

# GIBSON v. REYNOLDS (1).

(1925. No. 1293.)

(1925. No. 1294.)

*Negligence—Motor bicycle collision—Liability of owner of motor bicycle—Authority given by owner to rider of motor bicycle—Master and Servant—Agency.*

The plaintiff G was driving an outside car on which the plaintiff T was a passenger. A motor bicycle, the property of the defendant, which was ridden by H. R., defendant's brother, collided with and overturned the outside car and injured the plaintiffs. Each of the plaintiffs sued the defendant for damages for injuries caused by the negligence of the rider, which was admitted, and evidence was given to shew that at the time of the accident H. R. was acting as agent for the defendant. The defendant stated that his brother had general permission to ride the motor bicycle for himself or for the defendant, but that he never was in the defendant's employment.

The trial judge declined to direct in the defendant's favour on the question of agency, and left it to the jury to find whether the rider was was acting as the agent or servant of the defendant in the management of the motor-bicycle at the time of the accident. The jury answered this question in the affirmative, and found £6,388 and £150 damages in the two actions against the defendant. The defendant moved to have the verdicts set aside and judgment entered for him in the actions.—

*Held*, by the Court of Appeal (Andrews and Best L.JJ.), that the jury could properly find as they had done, that their findings and verdict must stand, and that the defendant's motions should be dismissed with costs.

Motions on behalf of the defendant, William Graham Reynolds, for orders that the verdict and judgment entered for the plaintiffs for the sum of £6,388 and £150 respectively, and costs, upon the hearing before the Hon. Mr. Justice Wilson and a special jury of the City of Londonderry on July 28th, 1925, be set aside with costs, and that judgment be entered for the defendant, dismissing the actions with costs, or in the alternative that a new trial be directed on the grounds:—

(a) That there was no evidence proper to be left to the

(1) In the Court of Appeal before Andrews and Best, L.JJ.

C.A. 1925

THOMPSON v. REYNOLDS.

GIBSON v. REYNOLDS.

jury that Harry Reynolds was the servant or agent of the defendant, and that the learned judge ought to have directed the jury to answer the said question in the negative.

(b) That the learned judge misdirected the jury by telling them that if the defendant had given Harry Reynolds general authority to ride the defendant's motor bicycle, the fact that Harry Reynolds at the time of the accident intended to call on the defendant for the purpose of showing him the motor bicycle would be evidence of agency;

(c) the improper admission of evidence as to the user of the motor bicycle by Harry Reynolds on occasions other than the day when the accident occurred;

(d) that there was no evidence to support the finding of the jury that Harry Reynolds was the servant or agent of the defendant;

(e) that the verdict was against the evidence and the weight of evidence;

(f) that the damages were excessive.

These actions were by consent tried together.

The plaintiffs alleged by their statements of claim that they had suffered damage from personal injuries caused by the negligence of the defendant's servant or agent in the management and control of a motor bicycle the property of the defendant, on Londonderry Bridge on 22nd September, 1924, and claimed damages.

The defendant, in addition to the usual traverses, pleaded that the motor bicycle was not on the date or at the place mentioned managed, controlled, or ridden by his servant or agent.

At the conclusion of plaintiffs' case Babington, K.C., asked for a direction. The learned judge refused, as he thought that the evidence of Gibson and Breslin was sufficient, if believed by the jury, to show agency.

The learned judge left five questions to the jury, which, with their answers, were as follows:—

1. Was Harry Reynolds guilty of negligence in the management and control of the motor bicycle at the time of the accident? Yes.

2. Were the injuries to the plaintiffs caused by such negligence? Yes.

3. Was Harry Reynolds the agent or servant of the defendant in the management of the motor bicycle at the time of the accident? Yes.

4. Damages? £150 in Gibson's case and in Thompson's case £6,388.

The jury accordingly found for the plaintiff Gibson against the defendant for £150 and for the plaintiff Thompson against the defendant for £6,388, and the judge gave judgment for each of the plaintiffs for the above sums with costs.

The facts and evidence so far as material are fully set out in the judgment of Andrews, L.J.

*A. B. Babington K.C.*, M.P. (Attorney-General), *Beattie K.C.* (with them *Lowry*) in support of the motion.

There is no evidence to establish the relationship either of master and servant or of principal and agent. Until general agency is shewn evidence that Harry Reynolds used the motor bicycle on previous occasions is irrelevant. This was not a case of agency at all, but of bailment, and we contend that there was no general agency. The direction given by the learned judge to the jury as to the effect of a general authority given by the defendant to Harry Reynolds to ride his motor bicycle was wrong in law. The evidence as a whole, shews that the relationship existing between the two brothers was that of bailor and bailee. The defendant was not identified with the negligence of his brother. We submit that save in cases of special contract, the bailor is not identified with the bailee so as to make him responsible for the bailee's negligence. *Wellwood* v. *King* (1). The relationship of principal and agent or of master and servant must be proved to render the defendant liable. Unless there is evidence, which can be submittd to a jury, of the relationship, it is the duty of the judge to direct the jury that there was no suffcient evidence. On the question of the effect of lending the motor bicycle we rely on *Powell* v. *McGlynn & Bradlaw* (2), and especially on the judgments of Fitzgibbon L.J. at pp. 188-190 and of Holmes L.J. at p. 195. We also rely on *Sanderson* v. *Collins* (3) (see the judgment of Romer L.J. at p. 633), and on the judgment of Lord Atkinson in *Samson* v. *Aitchison* (4), at p. 849.

(1) [1921] 2 I.R. 274
(2) [1902] 2 I.R. 154
(3) [1904] 1 K.B 628
(4) [1912] A.C. 844

C.A. 1925.

THOMPSON v. REYNOLDS.

GIBSON v. REYNOLDS.

In the present case we submit that the defendant gave up his right of control. The relationship of master and servant never existed in this case. The cases already referred to show that where there is merely the relationship of bailor and bailee, the bailor is not responsible for the acts of the bailee. These brothers did not live together, and they carried on independent businesses of their own. The plaintiff has failed to establish that Harry Reynolds was riding the motor bicycle as the agent of the defendant. A mere arrangement that Harry Reynolds should carry the papers would not take the case out of the class of bailments and put it into that of agency, *Cormack* v. *Digby* (1). It must be proved that on this particular day Harry Reynolds was riding the bicycle on his brother's business. *Dowling* v. *Robinson* (2). We submit that Harry Reynolds was a mere borrower, and that his showing the bicycle to his brother does not convert him into an agent. *Rayner* v. *Mitchell* (3) was a far stronger case for the plaintiff than the present. *Cormack* v. *Digby* (1) and *Powell* v. *McGlynn & Bradlaw* (4) are, we submit, strong authorities for the defendant, and he is entitled to rely on them.

*E. S. Murphy K.C.*, *Pringle K.C.*, with them *MacDermott* for the plaintiffs :—

On either view of the evidence the jury were entitled to find agency on the part of Harry Reynolds. He had authority to ride the motor bicycle, as the defendant said, " for himself or for me," and there was evidence that he usually rode the motor bicycle. We submit that the law is properly stated in Taylor on Evidence (11th edition). vol. 1, s. 196, and that the principle laid down applies to the facts of the present case. We rely on *Brown* v. *Wren Brothers* (5). There is in this case the very strongest evidence of the relation of agency qua these newspapers The jury having found agency, the court cannot say that the jury were not entitled to draw that inference. Ownership, coupled with the evidence given in this case, establishes, we contend, a prima facie presumption of liability. The law applicable where the relationship of bailor and bailee exists is stated by Ronan L.J. in *Wellwood* v. *King* (6) at p. 303 that " at

(1) I.R. 9 C L. 557
(2) 43 I.L.T.R. 210
(3) 2 C.P.D. 357
(4) [1902] 2 I.R. 154
(5) [1895] 1 Q.B 390
(6) [1921] 2 I.R. 274

the present day there can be no doubt that the mere ownership of a chattel does not make a man liable for damage caused with it by a person for whose conduct he is not responsible." In *Hibbs* v. *Ross* (1) it was held that the ship's register was prima facie evidence for the jury from which they might draw the inference that the persons in charge of the ship were employed by the defendant. To the same effect is *Joyce* v. *Capel and Slaughter* (2). We rely on *Boyle* v. *Ferguson Ltd.* (3), and especially on the judgments of Palles C.B., at p. 497, and Gibson J. at p. 498. We would submit if necessary that once Harry Reynolds decided to take the motor cycle out to show it to his brother, his character had changed and he had become his brother's agent. On principle there is no distinction between the present case, and *Boyle* v. *Ferguson Ltd.* (3). We suggest that there was a real relationship of principal and agent existing between the two brothers. *Powell* v. *McGlynn and Bradlaw* (4) differs entirely on the facts from the present case. On the question of onus we rely on *Cooper* v. *General Accident Asurrance Corporation* (5). *Cormack* v. *Digby* (6) is of very little assistance in a case of this kind, but we rely on the judgment of Palles C.B., at pp. 561-562. *Dowling* v. *Robinson* (7) is no authority in defendant's favour. *Rayner* v. *Mitchell* (8) differs in essentials from the present case. We contend that the The plaintiffs have given sufficient evidence to raise a presumption that must go to the jury, and it is for them to decide whether it has been rebutted or not.

*Beattie K.C.* (in reply) :—

A permission given to a man to use a thing cannot ripen into agency. The plaintiffs, we submit, must prove a request by the defendant to Harry Reynolds to do this work. Agency depends on more than permission to use the motor cycle. The evidence is perfectly consistent with the work being done by Harry Reynolds as an obligement for his brother. It is necessary for the plaintiff to prove that at the time of the accident Harry Reynolds was the agent of the defendant. We submit that there is no

(1) L.R. 1 Q.B. 534.
(2) 8 C. & P. 370
(3) [1911] 2 I.R. 489
(4) [1902] 2 I.R. 154
(5) [1922] 2 I.R. 38
(6) I.R. 9 C.L. 557
(7) 43 I.L. T.R. 210
(8) 2 C.P.D. 357

C. A. 1925

THOMPSON v. REYNOLDS.

GIBSON v REYNOLDS.

evidence of a general agency, there is merely evidence of a general permission. There was no evidence to show that on the day in question Harry Reynolds had been at the railway station or had been carrying any papers. Anything that Harry Reynolds did, was of his own volition and could not constitute him an agent of the defendant.

*Cur. adv. vult.*

ANDREWS, L.J.: These two appeals were conveniently argued together as both involved the same questions.

The plaintiffs claimed damages in respect of injuries caused by the negligence of the defendant's brother, Harry Reynolds, in the management and control of a motor bicycle, the property of the defendant, on Londonderry Bridge, on 22nd September, 1924.

The plaintiff Gibson was driving a side-car, on which the plaintiff Thompson was seated as a passenger, when Harry Reynolds, who was overtaking them on the motor bicycle, vainly endeavoured to force his way between the car and a lorry which was approaching from the opposite direction. In the collision which resulted the side-car was overturned and the plaintiffs injured.

The jury assessed the damages in Gibson's case at £150 and in Thompson's case at £6,388.

Negligence is admitted, and the only question in issue before us was the legal responsibility of the defendant for his brother's negligent act. The learned judge at the trial asked the jury (question 3)—"Was Harry Reynolds the agent or servant of the defendant in the management of the motor bicycle at the time of the accident," to which they answered, "Yes." This finding is challenged on the ground that there was no evidence proper to be left to the jury that Harry Reynolds was such servant or agent, and that the defendant was entitled to a direction: and, further, that the judge misdirected the jury by telling them that, if the defendant had given Harry Reynolds general authority to ride the defendant's motor bicycle, the fact that Harry Reynolds at the time of the accident intended to call on the defendant for the purpose of showing him the motor bicycle would be evidence of agency. The verdict was also challenged in the Notice of Motion on the ground of of the alleged improper admission by the learned judge of evidence as to the user of the motor bicycle by

Harry Reynolds on occasions other than the day upon which the accident occurred, such evidence being directed to prove agency. This point, if not abandoned, was not seriously argued before us, and in my opinion rightly so, for it is quite unsustainable. To the general principle that it is not admissible to prove a main fact by showing that facts similar to it, but not part of the same transaction, have occurred on other occasions, there are several exceptions, one of which has long been recognised to be that in proof of agency evidence can be adduced of repeated acts done by the agent and adopted by the principal. I shall only refer in support of this proposition to *Neal* v. *Erving* (1), *Watkins* v. *Vince* (2), *and Blake* v. *Albion Life Assurance Society* (3).

Andrews L.J.

Passing now to the defendant's main contention, it is necessary to consider very carefully the evidence before the jury upon which they found the existence of agency at the time of the accident.

This evidence naturally divides itself into two parts, (a) that which was given by William Gibson and Thomas Breslin, who were called as witnesses for the plaintiffs, and (b) that which was given by the defendant and his brother Harry. I shall deal with such evidence separately.

Gibson proved that he often saw Harry Reynolds before the accident at the Midland Railway Company's Station, and crossing the bridge in the mornings; that the defendant is a news-agent in the city, and that Harry used to pass his car in the morning between the station and the bridge end. He added that he often saw him going into the railway station in the mornings and getting the bundle of papers arriving by this train from Belfast, that he usually rode a motor bicycle, that he was usually carrying papers from the station on the back of his machine, but that he would not say he saw him every morning. On cross-examination he added that he did not notice Harry riding a push bicycle (he presumably referred to other occasions), that he saw him riding the motor bicycle, and that he could not say if there were any papers on the motor bicycle when the accident occurred. Breslin, who works with a firm

(1) I Esp. 61 (2) Stark 368 (3) 4 C.P.D. 94 p. 109-110

C.A. 1925

THOMPSON v. REYNOLDS.

GIBSON v REYNOLDS.

AndrewsL.J

of newsagents called Gaileys, proved that he carried papers for them from the Midland Railway Station, and that he had often seen Harry Reynolds going to the station in the mornings, that he had often seen him waiting at this morning train for papers, and getting them off the train, and that he had also seen him go away with them. Sometimes, he added, Harry had a push bicycle, and sometimes a motor bicycle. On cross-examination, he repeated that he had seen Harry Reynolds use a motor bicycle to take away the papers, and some mornings he had a push bicycle.

Such was the evidence when the plaintiffs closed their case. The defendant's counsel applied for a direction on the ground that there was no evidence of Harry Reynolds being the defendant's agent; but when this was refused he elected to go into evidence by which the defendant is, of course, now bound.

Before, however, dealing with the evidence given on the defendant's behalf it is convenient to consider the effect of the evidence given for the plaintiffs. In my opinion it was sufficient to establish a strong prima facie case that Harry had authority from the defendant to use his motor bicycle for the purpose of bringing papers in the mornings from the Midland Railway Station to his shop premises. If the plaintiff's evidence had gone further and had established that Harry had the newspapers with him at the time of the accident, the case would, I think, have been almost conclusively proved At any rate a verdict of the jury in favour of the plaintiffs on such evidence could not have been seriously challenged. The weakness of the plaintiffs' case was that they were unable to prove affirmatively that Harry had been at the station on this particular morning, or that he had the papers in his possession at the time of the occurrence. At the same time it must be remembered that the plaintiffs do not prove that Harry had not been at the station, or that he had not the papers. All that can be said is that the plaintiffs' witnesses did not see him at the station, and that they did not see the papers; and, though I recognise that the plaintiffs' case would have been a much weaker one than it now is had the evidence of the defendant's witnesses not been given, I am not to be understood as deciding that

the learned judge was wrong in refusing to give a direction at the close of the plaintiffs' case. The jury might, I think, reasonably have drawn an inference from Harry Reynold's previous use of the motor bicycle for carrying the papers, and the hour and place of the occurrence, that on this morning he had been at the station for the papers which he may have got, though no one called for the Plaintiffs could say they saw them, or which he may possibly not have got because of their not having come by the train. In other words, whilst affirmative evidence on plaintiffs' behalf as to Harry having received the papers would have established almost a conclusive case in their favour, the mere absence of evidence regarding them, though it weakened their case, was not necessarily destricutive of it.

ANDREWS L.J.

The case made by the defendant as to the circumstances under which Harry Reynolds was riding the bicycle at the time of the accident is a wholly different one; but having given it my most careful consideration I am of opinion that, if true, it is really a stronger case than that presented by the plaintiffs.

The defendant said that he used the motor bicycle, which was his property, going to and returning from his business: that on the Thursday or Friday previous to the accident he left the motor bicycle at Burney's, his brother-in-law's garage, to get new mudguards and number plate, and that he did not know if the repairs were finished. He did not know that his brother Harry had the bicycle out that day, but he added that "he had general permission to ride the motor bicycle for himself or for me." He further said that the bicycle was not employed for any of his business that day: that his brother was never in his employment, and that he was employed in the Midland picture house as a cinema operator. On cross-examination, referring apparently to previous occasions, the defendant said that he might have asked Harry as an obligement to bring over papers for him from the station, and that they were brought every morning by a message boy whose name he did not know. When pressed, he added that his brother might bring the papers once a month. Further, he said, his brother could have his bicycle any time he wanted it, and that he had general permission to ride his motor bicycle for any purpose. He next categorically denied that the motor bicycle ever brought papers from the station to his

C.A. 1925.

THOMPSON v. REYNOLDS.

GIBSON v REYNOLDS.

premises, and said that they were always brought by a push bicycle. Again he repeated that he did not arrange with Harry to go across and get the bicycle from the garage for him on the day of the accident, and that Harry only brought papers for him when he asked him, and always on a push bicycle as the motor bicycle was only for pleasure.

The last witness for the defence was Harry Reynolds. His evidence as to his employment in the Midland picture house and at Porters, who were wholesale newsagents, is far from clear. Possibly what he intended to convey was that he worked in the morning every day except Thursday for Porters, and at the picture house in the evenings and during the whole day on Thursdays

AndrewsL.J.

He explained his frequent visits to the railway station by saying that his duties took him there to collect films for the picture house, but he admitted that he used to lift papers at the station for his brother and give them to the message boy there. He asserted that he never used the motor bicycle to carry papers for his brother except once a month, and that before 12th July, 1924; he took over the papers on a push bicycle. Explaining his movements on the day of the accident, he said that he picked up the motor bicycle in the garage, and that he had no conversation with his brother about doing so, that he was not at the station, that he had no newspapers and was going no errand for his brother. When cross-examined, he said that he had the defendant's authority to take out the motor bicycle, that he did not tell him to take it out, and that it was untrue that he brought him the papers on the motor bicycle. He admitted that on rare occasions he brought papers on the motor bicycle to his brother. Referring to the day of the accident he said, 'I had to get to work at 10 o'clock at Porter's in Foyle Street. I went across the street and got the motor bicycle out of the garage and then was going to Porter's. I wanted a run before I went in. I brought the bicycle over to show it to my brother to see if the repairs were all right. On my way the accident happened.' ''

It is sufficient for the purpose of my judgment to direct attention to two portions of the evidence, the first of which was given by the defendant, that Harry had general permission or authority from the defendant to ride the motor bicycle either for himself or for the defendant, and the

other part of which was proved by Harry, that when the accident happened he was on the way from the garage bringing the bicycle over to shew it to the defendant to see if the repairs were all right. Here we find a general authority to Harry to use the motor bicycle for the purpose of either brother, coupled with a specific user of it on the occasion of the accident for the purpose of the defendant. He was, therefore, at that moment acting as the agent of the defendant. It is wholly immaterial that Harry appears, according to his evidence, to have contemplated a subsequent run on the bicycle for his own enjoyment, during which his character of agent would have been transformed into that of bailee. It is equally immaterial that, so far as credence can be given to the evidence, the defendant had not specifically requested Harry to get the bicycle for him, as, in my opinion, Harry's action was fully sanctioned by the general authority, to which the defendant himself deposes. It would be neither common sense nor sound law that a general authority, which was apparently frequently acted upon, could be recognised or repudiated at will, according as it was productive of benefit to the defendant or involved him a liability. I have, therefore, come to the conclusion that, on the evidence of the defendant and his brother alone, the jury were justified in arriving at the conclusion that Harry Reynolds was the agent of the defendant in the management of the motor bicycle at the time of the accident. I go further and say that it is the conclusion at which, as a juror, I myself would have arrived. No doubt it may be said that this purpose—taking the bicycle to shew it to the defendant to see if the repairs were all right—is a wholly different one from that suggested by the plaintiffs' witnesses, namely, bringing newspapers from the station; but when once the defendant elected to go into evidence it was competent for the jury to accept the evidence of either the plaintiffs' witnesses or the defendant's witnesses, or to accept the evidence partly of one and partly of the other. It is not for us to indulge in idle speculation as to the particular view which the jury took of the evidence, and I refuse to subscribe to Mr. Beattie's submission that more specific questions should have been put to the jury which would have amounted to a cross-examination of them as to which

ANDREWS L.J.

C.A. 1925

THOMPSON v. REYNOLDS.

GIBSON v REYNOLDS.

Best L.J.

account they accepted. In my opinion the questions submitted to the jury properly tried the case, and no exception appears to have been taken to them at the trial by counsel on either side.

Though many cases were cited to us in argument, I do not find that any useful purpose would be served by referring to any of them, as they all turn, as does this case, on their own particular facts. It requires no authority to establish the right of the jury to discriminate between the evidence of the witnesses, to accept that which they believe to be truthful, and to reject that which they consider false; and it is neither the province nor duty of this court to interfere with the verdict of a jury regularly obtained and properly supported by evidence. The defendant's motion must be refused with costs.

BEST, L.J. The plaintiffs in these cases claimed damages for personal injuries caused by the negligence of defendant's brother, Harry Reynolds, whilst riding a motor bicycle, the property of defendant, on 22nd September. 1924. Plaintiffs were crossing Londonderry Bridge on an outside car, Gibson being the driver and Thompson a passenger, and it is admitted that Harry Reynolds on the motor bicycle tried to pass the car, that he was negligent in so doing, and that injuries accrued to both plaintiffs as the result of his negligence. The only question argued before us was whether defendant is responsible for the admittedly negligent act of his brother, Harry Reynolds, the rider of the motor bicycle on the occasion.

The third question put to the jury by the learned judge who tried the case is as follows :—Was Harry Reynolds the agent or servant of the defendant in the management of the motor bicycle at the time of the accident?'' And the answer given by the jury to that question was, yes.

This finding of the jury is challenged by counsel for the defendant on the ground that there was no evidence that Harry Reynolds was the defendant's agent or servant at the time the accident occurred, and that at the close of plaintiffs' case defendant was entitled to a direction on this point; that the learned judge wrongly admitted evidence to establish agency; and that he misdirected the jury by telling them that, if the defendant had given Harry Reynolds general authority to ride the motor bicycle, the

fact that Harry at the time of the accident was on his way to show defendant certain repairs to the bicycle would be evidence of agency.

The wrongful admission of evidence was not seriously pressed, and, in my opinion, the learned judge was right in admitting the evidence as tendered to prove agency.

The question for us is: Was there any evidence proper to be submitted to the jury from which they could find that at the time of the accident Harry Reynolds was acting as agent or servant of the defendant, and—if the case were properly allowed to go to the jury on this point—was the matter left to them with proper directions and is their finding against evidence and the weight of evidence?

Best L.J.

Having regard to the exhaustive analysis of the facts and evidence which has been made by Lord Justice Andrews, it is unnecessary for me to travel over the ground once more, but I have come to the conclusion from a careful study of the evidence that there was a case to go to the jury and that, in leaving the case to the jury, there was no misdirection on the part of the learned judge.

The next matter we have to determine is not what answer we should have given to Question No. 3 if the burden of answering it had been laid upon us in the first instance. I am not at present certain whether I myself should have answered the question as the jury did. However, our duty is, not to answer the question, but to say whether, the case having been properly left to the jury, the answer given by them to the question is against evidence and the weight of evidence.

The matter was one unquestionably within the province of a jury, and I adopt the words used by Lord Herschell, C., in *The Metropolitan Railway Company v. Wright* (1), as reported at p. 154: "the verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find."

In my opinion the jury could properly find as they have done, and their finding and verdict must stand.

The defendant's motion should be dismissed with costs.

Solicitors for the appellant: *C. & H. Jefferson.*

Solicitors for the respondents: *Caldwell and Robinson.*

J. McC.

(1) 11 A.C. 152.

C.A.
1926.

JAN., 12, 13
FEB., 17

[IN THE COURT OF APPEAL.]

## HENRY, LIMITED v. M'GLADE (1).
## (1923. No. 266.)

*Lease—Property demised together with "all rights, liberties, privileges, and appurtenances to the said premises belonging or in any wise appertaining or therewith used or enjoyed"—Right or privilege to advertise premises by means of man standing with a board at entrance to arcade leading to café—Right known to the law—General words—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 6, sub-s. 2.*

The defendants, the proprietors of a licensed house and cafe in Belfast, claimed the right to advertise their premises by keeping a man with an advertisement board at the entrance to the Q. Arcade, which led up to and past defendant's premises. The plaintiffs were the owners of the Q. Arcade and the shops in it, and also of the shops in D. Place adjoining the entrance to the arcade. The plaintiffs had acquired this property in 1919, subject to the tenancies then existing. The defendant's premises were let on 20th July, 1899 to P. & F. M'G. for 21 years from 1st May, 1899, at an annual rent of £250. On 29th April, 1920, the plaintiffs made a quarterly letting of the premises to P. M.'G. at an annual rent of £600, and by a lease dated 15th February, 1921, the plaintiffs let the premises to P. M'G. in consideration of a fine of £12,000, at a peppercorn rent for one hundred years. The defendants' premises, while held under the lease of 20th July, 1899, were advertised amongst other means by a man standing with an advertisement board at the entrance to the arcade. In 1912, when structural alterations were made in the arcade, it was arranged that thenceforth the defendants could always advertise their premises by means of a man standing with a board at the entrance to the arcade.

In an action for a declaration that the defendant was not entitled to advertise his premises by means of a man standing with an advertisement board at the entrance to the arcade:—

*Held*, by the Court of Appeal (Andrews and Best L.JJ.), affirming the judgment of Wilson J., that the right or privilege claimed was a legal one, and that it passed to the defendant as lessee by virtue of the general words of the lease of 15th February, 1921, dealing with "rights, liberties, privileges, and appurtenances."

The following statement of the facts is taken from the note of the evidence by Wilson J.

The Queen's Arcade, and the shops in it, and the shops in Donegall Place, adjoining the entrance to the arcade, are now the property of the plaintiffs.

(1) In the Court of Appeal before Andrews and Best, L.JJ.

The plaintiffs acquired this property in the year 1919 subject to the tenancies then existing. The defendant's premises (now known as "Queen's Cafe") were let on 20th July, 1899, to Patrick and Francis M'Glade, for 21 years from 1st May, 1899, at a rent of £250, the licence being the property of the landlord. On 29th April, 1920, the plaintiffs made a quarterly letting to Patrick M'Glade at the annual rent of £600, pending negotiations for a new lease, and by a lease dated 15th February, 1921, the plaintiffs let the premises to Patrick M'Glade in consideration of a fine of £12,000 at a peppercorn rent, for 100 years. The M'Glades during the currency of the lease of 20th July, 1899, had, up to the year 1912, an advertisement of their premises at the entrance to the arcade, by means of a brass signboard on a pillar at the entrance. The name of the cafe was changed from the Castle Cafe to the Queen's Cafe, and the old signboard was altered and put up again with the new name on it. On a gate at the other side of the entrance in Donegall Place there was a framed menu card put up each day until 1912 showing the bill of fare of the cafe, and there was an illuminated advertisement on the gable of the cafe in the arcade. The gable of the cafe came further into the arcade than the front of the shops on the south side of the arcade, and this advertisement was visible to anyone looking into the arcade from Donegall Place. A man, with a board about two feet square advertising the cafe, stood at the entrance to the arcade, and sometimes on the street or footpath of Donegall Place opposite the mouth of the arcade. In 1905 objection was made to his standing on the street, and from 1905 onwards the man stood in the arcade at the entrance. No serious objection was ever made to his being there until shortly before the bringing of this action. He was there in 1919 when the plaintiffs bought the property and also when they made the quarterly letting on 29th April, 1920, and gave the lease of 15th February, 1921.

In the year 1912, Sir Otto Jaffe, then the owner of the property, made alterations in the arcade and made the shops at both sides of the Donegall Place entrance with glass fronts and sides, did away with the pillars on which the brass signboard with the advertisement was placed,

C.A. 1926

HENRY, LTD., v M'GLADE.

and also with the gate on which the menu card was shown daily. He also brought the sides of the Donegall Place shops out to the frontage along the arcade of M'Glade's cafe, and thus did away with the advertisement on the projecting gable of M'Glade's premises in the arcade. M'Glade objected to some or all of these alterations, and it was agreed that if M'Glade permitted them to be carried out he could always have his man at the entrance to the arcade, and he could also have a V shaped electric sign-board over the arch at the entrance to the arcade in Donegall Place.

Ever since 1912 the man with the advertisement board has stood daily at the entrance to the arcade, and has been paid for doing so by the M'Glades. Mr. M'Glade proved that this was a most valuable and necessary adjunct to his business, and that he would never have paid the fine of £12,000, if the plaintiffs had made any objection to its continuance.

It was held by Wilson, J., that the right or privilege claimed by the defendant was granted to Patrick M'Glade by the lease of 15th February, 1921, and passed to the defendant on the assignment of the premises to him, and that the acts complained of by the plaintiffs were done in exercise of this right or privilege; he therefore gave judgment for the defendant.

The plaintiff appealed to the Court of Appeal.

*M'Gonigal K.C.* and *Black* for the appellant:—While the quarterly letting continued, the M'Glades had no such right as is now claimed. The right is not one known to the law, and would not pass by the words of the lease or by section 6 of the Conveyancing Act, 1881. It is alleged by the defendant that there was a bargain, but there was no bargain contained in the lease under which the defendant now claims, nor is any such bargain pleaded. In any case there was no consideration for such a bargain. We rely on *Harrison* v. *Duke of Rutland* (2) and especially on the judgment of Lopes, L.J. at pp. 152—154. That case was followed in *Hickman* v. *Maisey* (3). *Burrows* v. *Lang* (4) is an authority for the proposition that a right

(2) [1893] 1 Q.B. 142
(3) [1900] 1 Q.B. 752
(4) [1901] 2 Ch. 502

such as is claimed here is unknown to the law. *International Tea Stores Company* v. *Hobbs* (1) was altogether different, as the right claimed there was a right known to the law. The defendant here is claiming a jus spatiandi, a right to wander at will. No such right as having a man wandering about with an advertisement board is known to the law, see the judgment of Farwell, J., in *International Tea Stores Company* v. *Hobbs* (1) In *Lewis* v. *Meredith* (2) Neville, J., said at p. 579 the right must be "of a nature which could be granted, that is to say, a right known to the law." In *White* v. *Williams* (3) the right claimed was a "right known to the law." In *Keppell* v. *Bailey* (4) Brougham, C., said at p. 535 "It must not . . . be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner."

So far as we know there is no case in which a right has been given to a man to wander over another man's land. If the defendant's contention is correct the effect of section 6 of the Conveyancing Act, 1881, is to create an entire revolution in the law of property. There is no instance in the books where a right has been established to have a man either standing in a fixed spot or walking in a circumscribed space.

*T. J. Campbell K.C.*, *E. S. Murphy K.C.* and *Ellison* for the respondent:—The defendant is bound by his bargain and cannot deviate from the position occupied at the entrance to the arcade. We submit that the evidence proves that the right had been habitually exercised from at least 1905. We claim a right to keep the man at or about the mouth of the arcade. We rely on the following passage which appears in the judgment of the Privy Council in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Ltd.* (5), delivered by Lord Shaw of Dunfermline, at p. 617, "The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle

(1) [1903] 2 Ch. 165
(2) [1913] 1 Ch. 571
(3) [1922] 1 K.B. 727
(4) 2 My. & K. 517
(5) [1915] A.C. 599

C.A. 1926.

HENRY, LTD., v. M'GLADE.

is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* (1) by Lord St. Leonards C., who observed, "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."

The size of the signboard is strictly defined by user, and there has been no suggestion on the part of the plaintiffs that there was any variation in size. The hours in which the right might be exercised have been strictly defined by the learned judge. We submit that the giving up of the electric signboard constituted sufficient consideration for the agreement of 1912. In *Moody* v. *Steggles* (2) the plaintiffs, the owners of a public-house, claimed the right to affix a signboard to the wall of the defendants' house. It was held that the easement claimed was a legal one, and that a grant of it by the defendants' predecessors in title to the plaintiff's predecessors in title must be presumed. In *Royal Mail Steam Packet Company* v. *George & Branday* (3), the right to spread coal dust over a wharf was treated as perfectly good, and in *Philpot* v. *Bath* (4) a right to place large stones on the foreshore was considered as a perfectly good easement. The position this man took up was steadily maintained for twenty-five years. We submit that this is a right that can be recognised by the Courts. There are many cases where advertising rights have been so recognised. The right that we claim is analogous to a right of support, it is an apparent right and was a matter of daily use. We rely on *Hansford* v. *Jago* (5), where it was held that a right of way de facto enjoyed by the tenants up to the date of the conveyances passed by way of express grant under the word "appurtenances," this word being treated as equivalent to "usually occupied." We rely on the judgment of Farwell, J., in *International Tea Stores Company* v. *Hobbs* (6), where he says, "It is in each case a question of fact to be determined on the circumstances of the case whether it (the right) has, or has not, been enjoyed within the meaning of the statute." The Court should not, unless compelled to do so, deprive the defendant of what has

(1) [1852] 1 Macq. 305
(2) 12 Ch. D. 261
(3) [1900] A.C. 480
(4) W.N. [1905] 114
(5) [1921] 1 Ch. 322
(6) [1903] 2 Ch. 165

been described by the learned judge who tried the case as a valuable privilege. In *Simpson* v. *Weber* (1) it was held that a right could be established to nail a virginia creeper to a servient tenement. The principle for which we are contending is to be found in *Heywood* v. *Mallalieu* (2). In *Hanbury* v. *Jenkins* (3) Buckley, J., was of opinion that an incorporeal right of way along both banks of a river might be appendant to an incorporeal right of fishing, the one being capable of union with the other without any incongruity. The Court should be slow to interfere with the judgment of the learned judge. (They also referred to *Hawkins* v. *Wallis* (4), *Drewell* v. *Towler* (5), *Hoare* v. *The Metropolitan Board of Works* (6), *Godwin* v. *Schweppes, Limited* (7), *Philipps* v. *Halliday* (8), *Long* v. *Gowlett* (9), *White* v. *Williams* (10), *Gray* v. *Bond* (11).

*M'Gonigal K.C.* (in reply):—We submit that the right claimed by the defendant is in fact a jus spatiandi. No single case has been quoted into which the human element enters. There is no single spot in the entrance to the arcade where it could be said, "thus far and no farther shalt thou go." *Heywood* v. *Mallalieu* (2) is, we submit, of no assistance to the plaintiffs in the present case. The only easements into which the human element enters which are recognized by the Courts are rights of way, and they are strictly defined. The Court should not now set up for the first time such a new right as is claimed by the plaintiff here.

*Cur. adv. vult.*

ANDREWS, L.J.: The facts of this case are so fully set out by Mr. Justice Wilson that I shall content myself with adopting his statement of them as my own, making only a brief reference to the principle points which they establish.

No attempt has been made by the plaintiffs to controvert the evidence that the defendant's premises, when held

(1) 41 T.L.R. 302
(2) 25 Ch. D. 357
(3) [1901] 2 Ch. 401
(4) 2 Wils. K.B. 173
(5) 3 B. & Ad 735
(6) L.R. 9 Q.B. 296
(7) [1902] 1 Ch. 926
(8) [1891] A.C. 228
(9) [1923] 2 Ch. 177
(10) [1922] 1 K.B. 727
(11) 2 Brod. & Bing. 667

C. A. 1926

HENRY, LTD., v M'GLADE.

AndrewsL.J.

under the lease from Sir Otto Jaffe of 20th July, 1899, were advertised amongst other means by a man standing with an advertisement board at the entrance to the Arcade, though until 1905 his position was admittedly close to the kerbstone of the footpath. So, also, it has not been denied that the defendant and Sir Otto Jaffe's agent entered into an arrangement in 1912, when structural alterations were being made in the Arcade, that henceforth the defendants could always advertise their premises by means of a man standing with a board at the entrance to the Arcade; and it is admitted that a man has since stood there daily with his advertisement board. The right or privilege was, accordingly, being exercised to the knowledge of all parties interested in the year 1919 when the plaintiffs acquired the Jaffe interest, and also in 1920 and 1921, when the quarterly letting and lease were respectively made by the plaintiffs to the defendant. This lease included in express terms a demise of all rights, liberties, privileges and appurtenances to the said premises belonging or in anywise appertaining or therewith used or enjoyed.

In these circumstances the case has been argued before us on one narrow legal issue:—Is the right or privilege claimed, namely, to maintain and keep a man with the advertisement board at the entrance of the Arcade, between certain specified hours daily, a right or privilege known to the law? If it is, the judgment of Mr. Justice Wilson must be affirmed.

The only difficulty, in my opinion, in the case is that no authority can be cited in which such a claim, involving the existence of a mobile human element, has been considered by the Courts.

It was expressly admitted by plaintiff's counsel during the argument that the defendant would not have any difficulty in upholding his claim, if, instead of the post to which the advertisement board is affixed being supported by a man, it had been inserted in a hole or socket in the ground. The plaintiffs' contention is that the precise point at which the man may stand is not defined and may vary from day to day, provided he does not transgress the limits fixed by Mr. Justice Wilson's Order, namely, "at

the Donegall Place entrance to the said Queen's Arcade ''; and, accordingly, that the right claimed is in its essence a jus spatiandi which is not known to the law.

There can, in my opinion, be no doubt that the demise in the lease of "rights . . . privileges and appurtenances to the said premises belonging . . . or therewith used or enjoyed" only includes a demise of such rights and privileges as are known to the law. This was clearly laid down by Farwell, J., when dealing with the corresponding and almost identical words of section 6 of the Conveyancing Act, 1881, *Burrows* v. *Lang* (1). The same learned judge further expounded this branch of the law in *International Tea Stores Co.* v. *Hobbs* (2), where he pointed out that such words are sufficiently wide to embrace privileges permissively enjoyed, something essentially different from such strictly legal rights as easements In that sense such privileges or rights may be precarious: still they must be rights of a character known to the law, and a mere jus spatiandi is not such a right (see page 172). If further authority were required for the latter part of this proposition it is to be found in yet another judgment of Farwell, J., in *Attorney-General* v. *Antrobus*, (3)—better known as "the Stonehenge case" —where the learned judge said (at p. 198):—"The public as such cannot prescribe, nor is jus spatiandi known to our law as a possible subject matter of grant or prescription"; and, quoting the words of Sir Francis North's argument in *Potter* v. *North* (4) he adds—"For such things as can have no lawful beginning nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good."

Andrews L.J.

I find it unnecessary, however, to refer to further authority on this subject for Mr. Campbell, who appeared for the defendant, freely and most properly admitted the proposition that the jus spatiandi is not known to our law. His answer to the plaintiffs' argument is simply that what his client claims is not a jus spatiandi. In this, in my opinion, he is quite right. The jus spatiandi means or implies a right of walking about, spreading out, or expanding; the right which is claimed and which has been upheld

(1) [1901] 2 Ch., 502
(2) [1903] 2 Ch., 165
(3) [1905] 2 Ch. 188
(4) [1669] 1 Vent. 387

C.A. 1926

HENRY, LTD., v M'GLADE.

AndrewsL.J.

by the learned judge is, in my opinion, rather a jus morandi or a jus manendi. The plaintiffs' counsel contended that if the judgment were upheld it would be competent for the defendant, should he so desire, to change the position of the man with the board from the Donegall Place to the Fountain Lane end of the Arcade, or to keep him walking up and down the Arcade; but clearly this is not so. The judgment merely gives the right to maintain and keep the man at the Donegall Place entrance to the arcade. Further, he is not empowered by the terms of the order to wander about with his advertisement board at the entrance, thereby causing inconvenience to persons frequenting or lawfully using the Arcade. On the contrary, the judgment expressly declares that the right to maintain and keep the man is subject to the limitation that he does not thereby cause any greater obstruction than is necessary; and it is right to add that the notes of the learned judge do not contain a scintilla of evidence in support of a claim to or assertion of any such right. No doubt the judgment does not define to the inch the precise spot upon which the man must take his stand; but common sense tells us that if his advertisement is to be seen by people passing up and down Donegall Place his position will be central at the mouth of the Arcade, not so far out as to cause an obstruction or to interfere with the rights of the public in Donegall Place, yet not so far back into the Arcade as to have the clear view of the advertisement board interfered with by the corner shops. The Arcade is only 10 feet in width, and it seems that if the effective character of the advertisement is to be maintained a distance of two, or at most, three feet in width and the same in depth represents fairly the practical limits of deviation in the position of this partly human and partly inanimate advertisement. If ever the principle of de minimis non curat lex is held to apply, surely it should be to such a case. I decline to hold that the right exercised within this restricted area can be properly designated as a jus spatiandi.

I am clearly of opinion that the plaintiffs' case fails, and that the appeal should be dismissed with costs.

C.A. 1926.

HENRY, LTD., v M'GLADE.

BEST, L.J., [having stated the facts as above set out] proceeded as follows:—

Best L.J.

In the argument before us it was contended by Mr. M'Gonigal, that the right to have a man, with an advertisement board, at the entrance to the Arcade was a right unknown to the law; and that therefore it could not pass by the words in the lease of 15th February, 1921, which are relied upon by defendant. In that lease the premises are demised to Patrick M'Glade, together with "all rights, liberties, privileges and appurtenances to the said premises belonging or in any wise appertaining or therewith used or enjoyed."

The contention put forward on behalf of the defendant is that from 20th July, 1899, onwards, or, at any rate, from the year 1912 onwards the tenants of the Queen's Cafe had used and enjoyed as such tenants the right or privilege of keeping between the hours of 8 a.m. and 5 a.m. and 5 p.m. on weekdays a man with an advertisement board advertising the Queen's Cafe premises, at the Donegall Place entrance to the arcade, and that that right was being actually used and enjoyed by M'Glade as such tenant in possession both when the quarterly letting of 29th April, 1920, was made and also when the lease of 15th February, 1921, was given to Patrick M'Glade, and that this right passed to him as lessee under the said lease by virtue of the words already cited.

Mr. M'Gonigal opened the case to us by urging that what was claimed here was virtually a jus spatiandi but as the argument developed it appeared that practically the sole question between the parties was whether or not the right to have a man with an advertisement board standing at a defined point at the entrance to the Arcade is a right known to the law, and, as such, whether it could be passed by the general words of the lease dealing with rights, liberties, privileges, etc.

We were referred to numerous cases on the question as to what rights of the nature in question in this suit are, or are not, known to the law. *Burrows* v. *Lang* (1), *International Tea Stores Company* v. *Hobbs* (2), and several other cases were cited.

(1) [1901] 2 Ch., 502 (2) [1903] 2 Ch., 165

C. A. 1926

HENRY, LTD., v M'GLADE.

Best L.J.

Mr. Campbell, made it clear that the defendant was not claiming a jus spatiandi, but, as he put it himself, that he was claiming a locus standi at or about the very centre of the entrance to the Arcade.

If a socket had been made at the entrance to the Arcade in which a pole containing a board and advertisement similar to the one in this action had been placed, and if it had been proved that that board and advertisement had been placed in that way from 1912 onwards could it have been contended that the right to continue that method of advertising would not have been given to the defendant under the words of the lease which have already been cited?

I can see no difference in principle between the right to have an advertisement on a board which is fastened to a pole stuck into the ground and the right to have such an advertisement held up by a man who is stationed at the precise point where the pole goes into the ground.

The matter that has troubled me in the case is the difficulty of controlling the human element in the advertisement. My colleague does not, however, take such a narrow view on this aspect of the case as I do, and I feel that I should not be justified in coming to a conclusion different from that at which he has arrived.

I agree that the appeal should be dismissed with costs.

Solicitor for the appellants: *W. K. Gibson.*
Solicitor for the respondent: *Joseph I. Donaghy.*

J McC.

[IN THE COURT OF APPEAL FOR NORTHERN IRELAND AND IN THE HOUSE OF LORDS.]

C.A. 1925.

JAN., 26, 27, H.L. 1926

FEB., 4, 5

H. EDWARDS (H. M. Inspector of Taxes) *Appellant;*

THE OLD BUSHMILLS DISTILLERY, COMPANY, LIMITED (in liquidation) ... ... *Respondents.*

*Revenue—Income tax—Carrying on of a trade—Company in liquidation—Review of decision of Special Commissioners upon Case Stated—Appeal to Recorder—Effect of decision of Recorder given in previous year—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Schedule D., and ss. 149, 195 and 196.*

The respondent Company carried on a large distilling business. In July and August, 1920, the shareholders passed resolutions for a voluntary winding up. The Liquidator, with a view to realization, did some distilling, but no distilling was done after the end of the tax year, 1920-21. In the tax year 1921-22 large sales of stock were effected. The Company was assessed to income tax for that year on the basis of the three preceding years, and on the footing that the Liquidator had carried on a trade in the year of assessment. There was an appeal to the Special Commissioners, who discharged the assessment on the ground that an assessment for the preceding year had been discharged by the Recorder of Belfast on appeal, and that they held themselves bound to follow that decision.

The King's Bench Division (Sir Denis Henry, Bart., C.J. and Brown J.) held that the Special Commissioners were not bound by the decision of the Recorder in respect of the previous tax year, and accordingly made a declaration to that effect, and referred the matter back to the Commissioners to proceed according to law. *Held*, by the Court of Appeal (Moore and Andrews L.JJ.), that the decision of the King's Bench Division was right, but varying the order remitted the matter to the Special Commissioners with a direction "that they should find as a matter of fact and wholly apart from the decision of the Recorder whether the profits in the year 1921-22 in respect of which assessment was made arose (a) from the carrying on of the trade, or (b) from realization sales and capital transactions incidental to the winding up of the business; and that they should thereupon proceed to affirm or discharge the said assessment according to law."

*Held*, by the House of Lords (Viscount Cave C., Viscount Haldane and Lords Atkinson, Shaw of Dunfermline and Sumner), affirming the Court of Appeal, that the Special Commissioners were not bound by the decision of the Recorder in respect of the year 1920-21, to discharge the assessment for the year 1921-1922, and that they should have gone into the facts and arrived at their own conclusions.

CASE STATED by the Commissioners for the special purposes of the income tax, as follows:—

At a meeting of the Commissioners for the Special Pur-

C.A. 1925.

EDWARDS v OLD BUSHMILLS DISTILLERY

1922, at Belfast, for the purpose of hearing appeals, the "Old Bushmills" Distillery Company, Limited, appealed against an assessment to income tax (schedule D.) in the sum of £18,149, less an allowance of £667 in respect of wear and tear of machinery and plant, for the year ending 5th April, 1922, made upon the company by the Special Commissioners under the provisions of the Income Tax Acts.

The respondents are a limited company incorporated under the Companies Acts, 1862 to 1890, having their registered office in London, and carrying on the business of whisky distilling at the Old Bushmills Distillery and the Comber Distillery in Northern Ireland. The objects for which the company was formed as set forth in its memorandum of association included amongst other matters the following, viz.: the carrying on in all their branches in any part of the world of the trades or business of wine and spirit merchants, rectifiers, compounders, distillers, etc., and to buy, sell, manipulate and deal (both wholesale and retail) in commodities of all kinds which can be conveniently dealt in by the company in connection with any of its objects. In February, 1920, the respondents received an offer to purchase all their fully paid ordinary shares at a price of £3 per share, which offer was shortly afterwards raised to £3 10s per share. This offer was not accepted, and at an extraordinary general meeting of the company held on 9th July, 1920, it was resolved to wind up the company voluntarily, and Mr. Thomas R. Burns was duly appointed liquidator. This resolution was confirmed on 5th August, 1920. In pursuance of this resolution the Comber Distillery was sold on 31st December, 1920, in its entirety with a portion of its stock. Owing to difficulties of title, and pending negotiations for the purchase of additional lands, the Old Bushmills Distillery was not put up for sale until March, 1921, when no offer of purchase was received. In the meantime in order that he might be in a position to offer the Old Bushmills Distillery as a going concern, and knowing that the value of the asset would be depreciated if the distillery were closed the liquidator, on behalf of the company, in addition to selling existing stocks, continued distilling operations, though on a reduced scale, up to March 31st, 1921. No whisky was distilled after

The liquidator continued to sell on behalf of the company the stocks of whisky with all possible expedition, but owing to the difficulty of finding purchasers at any given time for more than a limited quantity of one brand of Irish whisky, the sales extended over a period of more than two years, and at the time of the hearing of the appeal before the Special Commissioners (December 13th, 1922) the liquidator had thus disposed of about 9-10ths of the whisky held by the company at the commencement of the winding up.

The sales of whisky made for the years indicated below, were as follows:—

| | £ | s | d |
|---|---|---|---|
| Year ending 30th September, 1921 ... | 411,217 | 14 | 5 |
| Year ending 30th September, 1922 ... | 413,953 | 14 | 4 |
| 6 months ending 24th March, 1923 ... | 239,985 | 18 | 11 |

For the purpose of rendering certain portions of the stocks of whiskey saleable it was necessary for the liquidator to purchase on behalf of the company some whisky for blending purposes, also bottles and cases and also to incur general expenses. The total amount of such purchases and expenses for the year ending 5th April, 1922, was £21,000 4s 7d. Out of the proceeds of the sale of the Comber Distillery and the stocks of whisky the liquidator discharged all the liabilities of the company, including debentures, paid off all the preference shares, and at the time of the hearing before the Special Commissioners had made payments to the ordinary shareholders amounting in all to £7 10s 0d in respect of each ordinary share.

Upon an appeal to the Special Commissioners against an assessment for the year ended 5th April, 1921, the Commissioners held that the company was liable to assessment for income tax in respect of the sales of whisky made by the liquidator during the year. This decision was reversed upon appeal under the Income Tax Act, 1918, section 196, by the Recorder of Belfast, who held "that the transactions in question during the period August 5th, 1920 to April 5th, 1921, were capital transactions incident to the winding up of the business, and that the amount realized was not income within the income tax code."

The respondents were again assessed to income tax (schedule D.) in respect of the profits arising from the said sales of whiskey for the year ending April 5th, 1922.

C.A. 1925

EDWARDS v. OLD BUSHMILLS DISTILLERY

depreciation under section 189 of the Income Tax Act, 1918, and appealed to the Special Commissioners against said assessment under section 195 of the said Act. The Special Commissioners who heard the appeal decided that they were bound to follow the decision of the Recorder and discharged the assessment, and on the request of the appellant stated a case for the opinion of the High Court pursuant to sections 149 and 195 of the Income Tax Act, 1918.

The appellant imediately upon the determination of the appeal declared to the Special Commissioners his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, section 149.

The question for the Court was " whether the Special Commissioners were correct in discharging the assessment or whether the company was liable, and if so to what extent to assessment to income tax in respect of the profits arising from the said sales of whisky effected by the liquidator in the course of the winding-up of the company during the year ending 5th April, 1922."

The King's Bench Division (Sir Denis Henry, Bart., C.J., and Brown, J.) decided that the Special Commissioners were not bound by the decision of the Recorder in respect of the previous tax year, and made an order which contained a declaration to that effect, they accordingly referred the matter back to the Commissioners "to proceed according to law."

The Inspector of Taxes appealed to the Court of Appeal (1).

*The Attorney-General for Northern Ireland (Richard Best, K.C.)* and *J. C. Davison* for the appellant :—

This is not a case of winding up at all. The net question is whether having regard to all the circumstances there was such a trading going on as rendered the company liable to income tax. Here the Special Commissioners held themselves bound by the decision of the

(1) In the Court of Appeal before Moore and Andrews, L.JJ.

Recorder. The appellant here has been prevented from getting the opinion of the Court of King's Bench. The Court can only send the case back to the Special Commissioners in the exercise of a judicial discretion. Where there is a mixed question of law and fact, it is the duty of the Court to hear the question of law. We contend that in deferring to the opinion of the Recorder, the Special Commissioners were acting quite rightly. *Matthews* (*Surveyor of Taxes*) v. *The Cork County Council* (1), *Humphrey* (*Surveyor of Taxes*) v. *Peare* (2). On the general question we rely on *O'Kane & Co.* v. *The Commissioners of Inland Revenue* (3) and *Armitage* v. *Moore* (4). We rely very strongly on the length of time during which the business has been carried on. We submit that the Court should have drawn an inference as to whether or not a business had been carried on which rendered the respondents liable to income tax. We rely on *Herbert* v. *Samuel Fox and Co., Ltd.* (5) and *Inland Revenue Commissioners* v. *Eccentric Club, Ltd.* (6). The importance of these two cases is, that there were findings of fact in both of them which were afterwards reversed. In *Inland Revenue Commissioners* v. *Eccentric Club, Ltd.* (6) Pollock, M.R., says at p 410, "It is a clear rule that the questions of fact are to be found by the Commissioners, and that their decision cannot be upset if they have rightly applied the law to the facts found by them. It is an equally clear rule that the law must be interpreted by the Courts before which the Case Stated comes." To the same effect are the judgments of Warrington, L.J., and Sargant, L.J., at pages 416 and 424.

The Court of King's Bench ought to have determined the question, whether there was such trading carried on by the Company in 1921-22 as to render them liable to income tax. We ask for a decision on the law applicable to the case.

(1) [1910] 2 I.R. 521
(2) [1913] 2 I.R. 462
(3) 56 I.L.T.R. 25
(4) [1900] 2 Q.B. 363
(5) [1916] 1 A.C. 405
(6) [1924] 1 K.B. 390

L.C. 1925.

EDWARDS v OLD BUSHMILLS DISTILLERY

*Babington K.C.*, *E. S. Murphy K.C.*, *Pringle K.C.* and *Black* for the respondents :—

The real point at issue is whether the Recorder's decision is to stand or not. The Court of King's Bench could not deal with a mixed question of law and fact. The issue between the two parties is we maintain purely a question of fact. Shortly stated, it is were the respondents carrying on a trade, or were they realizing their stocks of whiskey? Were these transactions capital transactions or transactions in the course of trade? *O'Kane & Co.* v. *The Commissioners of Inland Revenue* (1) was treated entirely in the House of Lords as a question of fact. There was there no liquidation, and therefore no irrevocable resolution to wind up, and the decision to bring the business to an end might have been altered at any moment. We submit that the learned Recorder is judge both of fact and of law, and that there is an attempt here to evade his jurisdiction. In *New Zealand Shipping Co., Ltd.* v. *Thew* (2) Lord Sterndale quotes with approval at p. 221 the statement of Farwell L.J. in *New Zealand Shipping Co.* v. *Stephens* (3), "I only wish to add that I also agree with the passage read from Lord Justice Vaughan Williams' judgment, that the Commissioners ought not to state either side out of court, by stating under the guise of fact that which is really law." We rely on the words used by Lord Atkinson in *Great Western Railway Co.* v. *Bater* (4) at p. 12 as a correct exposition of the law. In the present case there is no dispute as to the law, the only dispute is as to a question of fact. We contended before the Court of King's Bench that the proper course was for the Special Commissioners to find the facts and then to come to a conclusion of law in accordance with the facts as found by them. The question whether the respondents were or were not trading has never been determined. We submit that the form of the case is both objectionable and embarrassing. *Mathews (Surveyor of Taxes)* v. *Cork*

(1) 56 I.L.T.R. 25
(2) 8 Tax Cases 208
(3) 5 Tax Cases 553
(4) [1922] 2 A.C. 1

*County Council* (1) and *Humphrey* (*Surveyor of Taxes*) v. *Peare* (2) do not affect the present case, as in both those cases only questions of law had to be decided. The appeal should be dismissed.

[They also referred to *De Beers Consolidated Mines, Limited* v. *Howe* (3) and *American Thread Co.* v. *Joyce* (4).]

Moore L.J.

*The Attorney-General for Northern Ireland* (in reply):—

We submit that the Special Commissioners having set out all the facts, the appellants were entitled to get the opinion of the Court as to the law which is applicable.

MOORE, L.J., delivered the judgment of the Court as follows:— Jan. 27

As to the question of liability of the company, we cannot answer it, as it is a question of law and depends on a conclusion of facts not yet found. On this we desire to say as little as possible, because in our opinion the Commissioners have not yet arrived at a conclusion of fact determining the case, and they must do so without any interference from us. The governing question is whether the profits in the year 1921-22 were annual profits from a trade, or profits not annual profits but from a realization of capital. This is a pure question of fact. It is the Commissioners' duty to decide this according to the evidence, and, having done so, to affirm or discharge the assessment.

We can, however, give them this guidance, and this relates, like the King's Bench Division Order, to the first question which appears to be solely concerned with the effect of the Recorder's decision in 1920-21 on the position in 1920-21. In our opinion, the decision of the learned Recorder on a state of facts as of the year 1920-21 would not be binding as to a different and subsequent state of facts in the year 1921-22, and the Commissioners must arrive at their independent decision on those facts, whether it concurs with the Recorder's decision for the previous year or not.

(1) [1910] 2 I.R. 521
(2) [1913] 2 I.R. 462
(3) [1906] A.C. 455
(4) 28 T.L.R. 233

C.A. 1925.

EDWARDS v. OLD BUSHMILLS DISTILLERY

In the main the Order of the King's Bench Division is correct, but to make our views more conveniently and clearly apparent as to the meaning of the expression "according to law," we have discharged it and substituted an amended order of our own. Andrews, L.J., will read our amended order.

It must be distinctly understood that once the Commissioners have heard and determined the matter according to law and made their discharge or confirmation of assessment as the case may be, nothing in our order or in the present proceedings will prevent either party from exercising his rights under either section 149 or 196, Income Tax Act, 1918.

We direct that each party abide his own costs in the King's Bench Division, and that the Inspector of Taxes do pay the respondents' costs of this appeal.

The Inspector of Taxes appealed to the House of Lords (1).

*The Attorney-General* (*Sir Douglas M. Hogg K.C.*) (of the English Bar), *J. C. Davison* (of the Irish Bar), and *Reginald P. Hills* (of the English Bar) for the appellant.

*E. S. Murphy K.C.* (of the Irish Bar), *A. M. Latter K.C.* (of the English Bar) and *A. Black* (of the Irish Bar) for the respondents.

At the conclusion of the argument on behalf of the appellant, counsel for the respondents being present but not being called upon, their Lordships delivered judgment as follows:—

THE LORD CHANCELLOR (VISCOUNT CAVE): My Lords, the respondents The Old Bushmills Distillery Company, Limited, carried on a large distilling business in the North of Ireland, and in July and August, 1920, the shareholders passed resolutions for a voluntary winding up. With a view to realization, the liquidator did some distilling, but

(1) Lords present: Viscount Cave, C., Viscount Haldane, Lord Atkinson, Lord Shaw of Dunfermline, Lord Sumner. The speeches in the House of Lords are printed from Messrs. W. B. Gurney & Sons short hand notes.

no distilling was done after the end of the tax year, 1920-21. In the following tax year, 1921-22, large sales of stock were effected. The company was assessed to income tax for that year on the basis of the three preceding years, and on the footing that the liquidator had carried on a trade in the year of assessment. On appeal to the Special Commissioners, those Commissioners discharged the assessment on the ground that an assessement for the preceding year had been discharged by the Recorder on appeal, and that they held themselves bound to follow that decision. The Commissioners stated a Case, in which they formulated the question for the decision of the High Court in these terms: "The question for the Court is whether we were correct in discharging the assessment, or whether the company is liable, and, if so, to what extent, to assessment to income tax in respect of the profits arising from the said sales of whisky effected by the liquidator in the course of the winding up of the company during the year ending 5th April, 1922." The High Court held that the Commissioners were not bound by the decision of the Recorder in respect of the previous tax year, and made an order which contained a declaration to that effect, and referred the matter back to the Commissioners "to proceed thereon according to law." On appeal to the Court of Appeal of Northern Ireland, that Court agreed with the High Court, but varied the form of the order and remitted the matter back to the Commissioners with a direction "that they should find as a matter of fact and wholly apart from the said decision of the Recorder whether the profits in the year 1921-2 in respect of which assessment was made arose (a) from the carrying on of the trade, or (b) from realization sales and capital transactions incidental to the winding up of the business; and that they should thereupon proceed to affirm or discharge the said assessment according to law." The form of the order is different, but the effect is substantially the same. The Inspector of Taxes has appealed to this House against that Order.

My Lords, I agree that the Commissioners were not bound, by the decision of the Recorder in respect of the year 1920-21, to discharge the assessment for the year

H.L. 1925.

EDWARDS v OLD BUSHMILLS DISTILLERY

1921-22. The facts in the latter year may have been, and to some extent were, different, and I think that the Commissioners should have gone into the facts and arrived at their own conclusion. I agree also that the High Court could not, on the Case stated to them, determine the question of fact whether a trade was carried on in the year 1921-22. The Commissioners, under the belief that they were bound by the Recorder's decision, appear to me to have stopped short in their findings of fact, and the Case contains no finding on the material question—trade or no trade. I think that the High Court and the Court of Appeal were right in refusing to go into that question, and I do not doubt that your Lordships will take the same course.

This being so, it is clear that the case must go back to the Commissioners, and the only question is, on what terms? Section 149 of the Income Tax Act, 1918, provides two methods in which a case may be sent back to the Commissioners. Under sub-section (2) paragraph (a) of that section the High Court may "remit the matter to the Commissioners with the opinion of the Court thereon, or may make such other order in relation to the matter as to the Court may seem fit." Under paragraph (b) of the same sub-section there is an alternative course; the High Court "may cause the case to be sent back for amendment, and thereupon the case shall be amended accordingly, and judgment shall be delivered after it has been amended." Of these two courses, I might myself have preferred the latter, because it would have secured the return of the case for the decision of the High Court itself; but the Court in its discretion took the former course and referred the matter back to the Commissioners for consideration and decision, and it does not appear to me that your Lordships ought to interfere with that exercise of discretion by the Court. It has been suggested that if the order stands the effect may be that the Commissioners may decide for the Crown, and that on appeal the Recorder may reverse that decision, and that the Crown will then have no means of questioning the Recorder's decision. As to whether that is so I say nothing; but if so, that is the effect of the Income Tax

Act, and I do not think the House of Lords can go into a question of that kind. The Act must have such effect as it has.

In my opinion the order of the Court of Appeal should stand, and I move your Lordships that this appeal be dismissed with costs.

VISCOUNT HALDANE: My Lords, I concur. As regards Ireland, at all events, the question of the remedy of the subject against an assessment is prescribed by sections 195 and 196 of the Income Tax Act, 1918. The Special Commissioners entertain the appeal in the first instance, "and their determination on any such appeal shall be final and conclusive, unless the person assessed requires that his appeal shall be re-heard as hereinafter provided"—that is, before the Recorder or the County Court Judge—"or unless, under the provisions of this Act, a case is required to be stated for the opinion of the High Court," and the assessment, in default of these things, is to be final. Now if one goes back to section 149, which is the section which enables the subject to go to the Court, he can only go if he is dissatisfied with the determination of the Commissioners as being erroneous in point of law, and if he takes that view he may go to the Commissioners and require them to state a Case for the opinion of the Court, and then, if the High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm, or amend the determination in respect of which the Case has been stated, they may remit the matter to the Commissioners with the opinion of the Court thereon, or make such other order in relation to the matter as to the Court may seem fit.

My Lords, in this case the Commissioners having decided in one way in one year and having been reversed by the Recorder, the next year thought they were bound by the decision of the Recorder in the previous year, but, on appeal to the Court on the point of law so raised, the Court said: "No, the Commissioners were not bound by the decision of the Recorder in the previous year, and they must determine the case on the footing that they were free." It is said that, the facts being all set out, the Court ought to have expressed an opinion on them, which would have bound the Commissioners. My Lords, the

H.L. 1925.

EDWARDS v. OLD BUSHMILLS DISTILLERY

Commissioners are dealing in this case with a subsequent year, and it may be that, having been told that they were wrong in thinking they were bound by the decision of the Recorder in the previous year, they will require some further information before they come to a final decision. I do not know, but I think, that the consideration that this is possible affords additional reason for holding strictly to the limitation prescribed by the Act, that it is only on a point of law that you can go to the Court. Now I am not satisfied myself that we have got all the materials required for the decision of the point of law which is said to arise, namely, that on the facts as found there had been trading. The Court in its discretion has referred the matter back to the Commissioners to re-hear, and I am of opinion that that was, whether the most convenient course or not, the safest course to take, and, as they have taken it, I am not prepared to disturb the decision of the Court below.

LORD ATKINSON: My Lords, I concur, for the reasons given by my noble friends who have preceded me.

LORD SHAW OF DUNFERMLINE: My Lords, I concur with your Lordship on the Woolsack.

LORD SUMNER: My Lords, I concur in the motion proposed by the Lord Chancellor, for the reasons he has given.

Questions Put.

That the Order appealed from be discharged.

The Not Contents have it.

That the order appealed from be affirmed and this appeal dismissed with costs.

The Contents have it.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Herbert Z. Deane & Co.*, for *Shean & Dickson, Belfast.*

J. McC.

[IN THE COURT OF APPEAL.]

# ESTATE OF COLONEL HUGH THOMAS LYLE (1). (N.I. 5. COUNTY DOWN.)

*Landlord and tenant—Building ground—Exclusion from operation of Northern Ireland Land Act, 15 & 16, Geo. 5, ch. 54, s. 8, s.s. 3 (d)—Onus of proof—Scope of appeal.*

Four holdings in the vicinity of the City of Belfast were not included in a provisional list of land to become vested in the Land Commission under section 17 sub-section 2 of the Northern Ireland Land Act, 1925, as the result of a preliminary investigation by the Land Purchase Commission, on the ground that each holding possessed "a substantial value or utility whether potential or actual as building ground."

On objections by the four tenants to this exclusion, the Land Commissioners, having heard evidence, declared that the lands forming the subject matter of the four objections did not possess "a substantial value or utility whether potential or actual as building ground," and accordingly allowed the four objections.

*Held*, by the Court of Appeal (Moore C.J., Andrews and Best L.JJ.), reversing the judgment and order of the Land Commissioners, that in sub-section 3 (d) of section 8 of the Northern Ireland Land Act, 1925, the word "substantial" qualifies both the words "value" and "utility," and that the words "whether potential or actual" must be read as qualifying or enlarging both the words "value" and "utility," and that the holdings in question possessed a value or utility for building purposes within the meaning of the sub-section.

*Held* further, that where the lands are agricultural the onus of proving that holdings are excepted from the operation of the compulsory purchase provisions of the Act lies on the landlord.

*Held* further, that an appeal lies from the order of the Land Commissioners as well on questions of fact as on questions of law.

APPEAL from an order of the Land Purchase Commission allowing objections by four tenants of the estate of Colonel Hugh Thomas Lyle to the non-inclusion of their holdings in the Provisional List published by the Land Commission by virtue of section 17 sub-section 2 of the Northern Ireland Land Act, 1925, on the 7th October, 1925.

These holdings had been excluded from the Provisional List as the result of a preliminary investigation by the

(1) In the Court of Appeal before Moore, C.J., Andrews, L.J., and Best, L.J.

C.A. 1926

LYLE'S ESTATE. MAY, 3, 4, 17.

Commission, on the ground that each holding possessed "a substantial value or utility whether potential or actual as building ground."

The objections were considered by the Court of the Land Purchase Commission before which evidence was given by the tenants and the landlord as to the nature of the holding with reference to their development as building sites.

*E. S. Murphy K.C.* and *Monroe K.C.* (with them *Dougherty*) for the landlord Colonel Lyle.

*The Attorney-General for Northern Ireland (A. B. Babington K.C.)* and *William Beattie K.C.* (with them *Ellison*) for the tenants, W. A. B. Ferguson (in respect of two holdings), James Edward Grey, and Thompson Ferguson.

[The following summary of the evidence is taken from the judgment of Lord Justice Andrews in the Court of Appeal.]

The nearest point of the lands of Mr. Wm. A. B. Ferguson is within a quarter of a mile of Dundonald village, which is built on the main road leading from Belfast to Newtownards. The lands of the other tenants, James Edward Gray and Thompson Ferguson, immediately adjoin. The lands are approached by what is at the present time a third class district road; but the main road is one of the principal and best maintained arteries of traffic in Northern Ireland. Although the number of houses erected in immediate proximity to the lands in question during the past few years is admittedly small, one must remember the period through which we have been living, and the very high cost of building which still prevails. For the first few post-war years, the state of the building trade was largely one of stagnation, building owners and even speculative builders alike awaiting the anticipated fall in prices of material and in wages which would make building once again an economic proposition. Though anticipations in this respect have not been fully realised, the last two or three years have witnessed a marked renewal of building activities compelled by the necessity of overcoming the unprecedented shortage of houses for a rapidly increasing population; and it cannot be denied that the eastern portions of Belfast and the adjoining parts of the County of Down have received their

full share of attention, more especially for villa residences. Extensive building operations are being carried out at the present time in the neighbourhood of the city boundary. Some houses which have just been erected or are being erected are to be found near the junction of the Comber and Newtownards Roads within about half a mile from Dundonald village; Dundonald Railway Station has been surrounded by villas and bungalows. There are very special reasons for the extension of the city in this direction. All country districts have been brought closer to the city by the development of motor transport. New golf links have been opened in the neighbourhood, the nearest point of which is only about half a mile from the lands with which we are concerned in the present case. Last, but perhaps chief of all, is the recent acquisition of Stormont Castle and demesne as a site for the new Parliament Houses of Northern Ireland, with its administrative buildings to which probably several hundred civil servants will come daily for the performance of the work of the Ministries to which they are attached. Members of Parliament and its officials will swell the number of those who, from motives of convenience alone, may find it advantageous to acquire a residence in this neighbourhood.

Such is the general aspect of the case. What next are the special features of the lands? It is urged on behalf of the tenants that the approach from the county road is steep; that the situation is inconvenient as being removed some distance from the county road; that building would be expensive because of the slope of the lands and the additional cost of cartage of materials; and that the public would be deferred from building by the absence of the city lighting, water, and sewerage. In answer to these objections it is contended with great weight that an incline of 1 in 15 or thereabouts is quite a usual gradient; that houses built on these lands would be in sufficient proximity to the main road to enjoy all its traffic convenience whilst removed from its discomforts of noise and dust; that the additional cost of building would be more than compensated for by the beautiful view, good drainage, and healthy situation which so frequently induce people to build, especially villa residences, on high lands. Lastly, it may be said that the absence of the City conveniences referred

C.A. 1926.

LYLE'S ESTATE. MAY. 3, 4, 17.

to have a set off in freedom from city rates; and it may further be urged that, as building in the district develops, an extension of the city boundary, carrying with it the services mentioned, may not only be contemplated but expected.

Finally, turning to the expert evidence as to the possession by the lands of a value as building ground, Mr. Wheeler, the surveyor who was called for the tenants, was unable to deny its existence. The furthest he could go was that he thought it was very remote, and that there would be a good deal of other ground built up before this would be started on. A subsequent answer showed that he was directing his evidence to the question of thoroughly developing the lands as building ground. When further pressed, he stated it as his opinion that it should certainly be more than twenty-five years before these lands would be developed for building purposes, and then only possibly the fringe of them. At a later stage of his evidence, whilst qualifying his opinion by saying it is very problematical, he said that he would expect development on the frontage of the lands within forty years. Mr. Neill, an estate agent and auctioneer, when asked if the lands had any value as building ground, gave the guarded answer: "No immediate value." He expected, however, at least some development at the end of twenty or thirty years. In cross-examination, he admitted that in the future they might have a value as building ground, but not now. Mr. Armstrong, a builder, when asked his opinion, similarly qualified his answer by saying that he "would not like to take them and start to build property on them for nothing at the present time." Mr. Thornberry, another builder, spoke of possible development in forty years. Morrow, a resident in the neighbourhood, reached the high water water at fifty years. For the landlord, Mr. Swiney not only thought the lands could be developed for building, but considered that they possessed to-day an actual value for building. Whilst he thought it would take a very considerable time to develop all the lands for building purposes, he was of opinion that, if put up now to be let for building, there would be application for sites within two or three years, and it would go on increasing after that. When asked by the Commissioner to say

whether the present value for building purposes was substantial, he gave a reply which was much pressed upon us by counsel for the tenants, that he did not know that he could give an answer to that, adding that "substantial" was a very relative term. I do not think it right to press this answer too strongly against a witness who is universally recognised as one of the most honest and conscientious witnesses who ever gave evidence. His hesitancy in expressing an opinion as to whether the building value was "substantial" or not was quite reasonable and proper, when the true meaning of that word was actually one of the matters in controversy in the case. Mr. Burke Murphy, a most experienced estate agent, regards the land as preeminently building ground, and he does not hesitate to say that it has a substantial value as building ground, adding that if it were in his hands now he has no doubt he should be able to get some of it sold very very soon for villas, though it would be admittedly a matter of speculation when he should have it covered. Mr. M'Millen, a builder and contractor, agrees as to the existence of a substantial value for building purposes, and generally concurs with Mr. Burke Murphy's evidence.

Arguments were addressed to the Court as to the construction of section 8 sub-section 3 (d) of the Act of 1925.

MR. CROOKSHANK, JUDICIAL COMMISSIONER, in delivering the judgment of the Court of the Land Purchase Commission, said:—

This case came before us on certain objections by the tenants to the provisional list published by the Commission, on the ground of the exclusion from the list of four holdings. These holdings have been excluded from the list as the result of a preliminary investigation by the Commission, on the grounds—to use the words of section 8 (3) (d) of the Act of 1925—that each holding "possesses" a substantial value or "utility whether potential or actual as building ground." These words are no doubt peculiar and difficult to construe, and to get at any rational meaning it is necessary, in our opinion, to arrive at some conclusion as to the class of cases aimed at by the section, which were to be excluded from the compulsory land purchase provisions of the statute.

L.Com. 1926.

LYLE'S ESTATE. JAN., 29 FEB., 11.

APPEAL. 1926.

MAY. 3. 4, 17.

It will be admitted that all lands are capable of being built upon, and in that sense all lands are potentially building ground. This potentiality I refer to, for want of a better expression, as building capacity.

It is obvious, we think, that under the Land Law Code this building capacity was the property of the landlard.

Section 5 (1) (3) of the Act of 1881 prohibits the tenant from subletting without which the building capacity could hardly be used, and the tenant is further prohibited from erecting a dwelling-house on the holding other than in substitution for those already there.

The landlord, on the other hand, was entitled with the permission of the court, and on payment of compensation, to resume possession of the holding for reasonable and sufficient purpose having regard to the good of the holding or the estate, including the use of the ground as building ground.

This being the position of the two parties concerned if the holding was sold under the earlier Land Purchase Acts to the tenant the fee simple of the holding, including its building capacity, passed to the tenant.

The building capacity, in cases where the holding was situated in the country remote from any town, was not as a rule of any value, though in cases where the holding was situated in the vicinity of a town it might be, and often was, of considerable value to the landlord.

Under the purely voluntary provisions of the earlier Land Purchase Acts this question of building capacity did not attract much attention, for the simple reason that if a landlord for any reason did not wish to sell any particular holding to the tenant there was nothing to compel him to do so, and therefore it may be assumed that under these earlier purely voluntary Acts lands in the neighbourhood of towns, where the value of the building capacity was thought to be large, were not sold at all, or if they were sold, something was added to the purchase money in respect thereof, or the landlord waived any claim for the same.

It was only when the purely voluntary provisions of the earlier Acts were followed by the semi-compulsory provisions of the Acts of 1903 and 1909 that the question of

building capacity became one of practical importance, though even then the Legislature was silent as to the manner in which these holdings in the vicinity of a town were to be dealt with.

Under the Acts of 1903 and 1909 though there was no compulsion on a landlord to sell his estate, still if he did enter into agreements he was bound to sell such a portion of his estate as the Estates Commissioners might declare fit to be regarded as a "seperate estate," in other words, he was not the sole judge of what part of his property he might sell.

In one case the owner of a large estate which in places was in the vicinity of Belfast, entered into agreements with a number of tenants on what he considered to be the purely agricultural part of his property, but did not enter into agreements to sell the part bordering on Belfast on account of the existence of the building capacity inherent in such part. The tenants of that part of the property adjoining Belfast applied to the Commissioners to refuse to declare the agricultural portion of the property as a separate estate unless the portion adjoining Belfast was also included. After careful consideration of the circumstances the Commissioners ultimately decided the matter by declaring that certain holdings should be included in the estate and that certain other holdings in the vicinity of Belfast might be excluded on account of their building capacity.

We refer to this case not in any way as an authority binding on us under the present Act, but because it illustrates the difficulty of dealing with this question of building capacity, and shews the difficulty the Legislature was confronted with in framing a compulsory measure.

The Legislature has, in this Act of 1925, endeavoured to settle this question by providing that any holding which possesses a substantial value or utility whether potential or actual as building ground is not automatically to vest in the Commission along with the other tenanted land in Northern Ireland. Conceivably a plan might have been adopted by which an increased purchase money might have been placed on these lands as a method of compensating the landlord for any loss he might sustain by the compulsory sale of such lands, but this plan, if feasible,

L.Com. 1926

LYLE'S ESTATE. JAN., 29. FEB., 11.

MAY, 3, 4, 17.

was not adopted, the Legislature merely providing that if the building capacity was of a substantial value or utility then the holding was to remain outside the provisions of the Act, but if the building capacity was not of a substantial value or utility then such building capacity inherent to the holding was, with the holding, to become the property of the tenant.

If then the holdings in the present case are not to vest in the Commission, the result, as far as the tenants are concerned, will, it appears to us, be: (a) the tenants will be deprived of the compulsory purchase terms applicable to other tenants (b) they will be entitled to hold on to their tenancies in the same way as they now hold the same, and (c) they will be subject to the right of resumption by the landlord—a right which may never be exercised, and which can only, as the law now stands, be exercised where the court is satisfied that the landlord has a clear, settled, and definite purpose of converting the lands which are suitable for building into building ground.

If, on the other hand, the holdings are to vest in the Commission, then the landlord loses his entire interest in the holding, including any right of resumption, but is paid the purchase money and bonus provided by the statute.

Now as to the terms of section 8 (3) (d) of the Act of 1925 in question, it seems to us clear that the governing word in the section is "substantial." Whatever value or utility the holding possesses, whether potential or actual, this value or utility must be substantial if the holding is to be excluded from the general vesting provisions of the statute. If this word were disregarded, the section might be held to exclude from the general provision of the Act practically every holding in the six counties.

Again, it appears to us that this substantiality is to be judged as at the present. Whether the value or utility is potential or actual it must at all events be substantial, and to be substantial it must, it appears to us, be something real and tangible at the present time; that this is so, is further borne out by the wording of the section which is in the present tense, "any holding which possesses a substantial value or utility." It would not be sufficient to show that the holding might possess a substantial value or utility in some time to come.

In the present case we have had the advantage of hearing the arguments of counsel, we have heard the evidence tendered to us on behalf of both the landlords and the tenants and we have personally visited the lands.

It appears to us on the evidence that the lands situate as they are some little distance from the main road from Belfast to Newtownards near the village of Dundonald and outside the city boundary and on the side of a rather steep hill without sewerage, public lighting, or water—except from wells—are not lands which an ordinary speculative builder would take for the purposes of building thereon small houses, and that they are more the sort of lands which might be required for the building of villa residences of a larger kind, with perhaps a little land attached, but as these villas are not required to the same extent as the smaller houses it is more difficult to calculate when, if ever, this land might be required for such building development, than it would be in the case of land lying along a main road.

All the witnesses seem to agree on one point, viz., that Belfast is extending in the direction of Dundonald, but that this extension is going on slowly, as we think principally along the south side of the road near the railway station and in the village of Dundonald.

It has also, we think, been shewn that the lands in question have a value or utility as building ground, but whether these lands are likely to be utilized in the near future it is impossible to say, the estimates as to the time when the lands may be utilized vary from 50 years to "very very soon."

Though it is, we think, common ground that these lands have a value or utility as building ground, we are not satisfied that this value or utility is a substantial one as viewed at the present time.

We have arrived at this conclusion with some hesitation, as the case seems to us to be nearly a line ball case, but as the statute has cast the onus upon us of saying whether the lands possess a substantial value or utility whether potential or actual as building ground, we answer that they have not, and accordingly that the tenants are entitled to have their holdings included in the sale, and we accordingly allow the objection of the tenants to the non-inclusion of these lands in the provisional list.

C.A. 1926.

LYLE'S ESTATE. MAY. 3, 4, 17.

An order was drawn up in the terms of the above Judgment, and from this judgment and order the landlord appealed.

*E. S. Murphy K.C.* and *Monroe K.C.* (with them *Dougherty*) for the appellant.

The Commissioners have gone astray in their interpretation of sub-section 3 (d) of section 8. They have found that the lands have a building value, but that it is not substantial at the present time. In their judgment they say, "this substantiality is to be judged as at the present"—that is their ratio decidendi. The word "potential," the paramount word of the sub-section, has been left out of consideration. The words "actual" and "substantial" in the sub-section refer to the present, but the word "potential" introduces the element of futurity. The Court is in this case a prophet, and must look into the future. The only difference between the parties on the evidence—since all the witnesses agree that the lands will be built on some time—is the question of time, that is how long it will be until the holdings are built over. If the near and immediate future is to be the test of "potential," no land would have an "actual" value as building ground because all value would be "potential" until the land was built on. The main factor in the case is the proximity of the holdings to Belfast. At the present time the "actual value" as building ground is no doubt affected by the absence of such amenities as gas, sewerage and efficient water supply, but does this imply that uses in the future of the holdings for building purposes is to be ignored? " Potential " has equal stress with the other words of the sub-section and must be given full force : it implies something that does not exist now but will in the future. The question to be answered is what is the likelihood of development taking place in the future, and the time limit is introduced by the word " substantial " (compare section 16 sub-section 2 of the Act). If the development is not likely to take place within a reasonable time the potential qualities of the holding as building ground must be disregarded. The question is, is the likelihood of such small account as to be thrown aside as unsubstantial? In this case that cannot be, the proximity

of the lands to Belfast, which is rapidly spreading outwards, being considered. The judgment must be formed now as to future probabilities.

As this is the first case as to the construction of the Northern Ireland Land Act, 1925, authorities are useless: but the case of *Archbold* v. *Charters* (1), a decision on the construction of section 58 of the Land Law (Ireland) Act, 1881, may be of some assistance: obviously it was a case such as that that was present to the mind of the draftsman of the 1925 Act when the word "potential" was introduced.

As to the burden of proof: an onus is cast on the party who objects to exclusion from or inclusion in the provisional list published by the Land Purchase Commission. In this case the objectors are the tenants, on whom the onus is thrown of proving that their holdings should have been included in that list: see rule IX. ord. 3 of the provisional rules published by the Commission.

[ANDREWS L.J.: Onus should not depend on a question of exclusion or inclusion from a provisional list drawn up without evidence having been heard.]

If the onus does not lie in the objector, it is on the Commission to justify its provisional list.

*The Attorney-General for Northern Ireland (A. B. Babington K.C.)*, *William Beattie K.C.* (with them *Ellison*) for the respondents.

The question narrows down to the construction of subsection 3 (d) of section 8. It bears internal evidence of much negotiation and ultimate compromise. Can the words "substantial value" and "potential" be reconciled? If they cannot, how much of each is to be omitted? If the two are mutually exclusive one must be disregarded. "Substantial value" are the governing words of the sub-section. In one sense all lands are potential building grounds, but a time limit of some sort must be introduced, otherwise all land would be excluded from the operation of the Act; therefore limits must be placed on the meaning of the word "potential" in reference to the building value of the lands. It cannot be limited entirely by the position of the lands, for you cannot say that all land within a certain distance from a city

(1) [1900] 2 I.R. 262

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4, 17.

is potential building ground and beyond is not. Demand is a test of potentiality and a necessary one, and this demand must be represented in "value." It was not intended that the landlord should have been actually asked to let the lands as building ground, hence the word "potential" was used: but this potentiality must not be a matter of the future. How can the Court forecast future development of any city or town? The potentiality must be so strong that it has a substantial value at the present time: if it is only to arise in the future it cannot be substantial, and the word "potential" must yield to "substantial value." The scope of the inquiry must turn on the potential value of the lands as building ground, substantial at the present time, and not a value that is to arise in the future: it is necessary to look into the future to see if the land is likely to be developed, but yet, that future development must have a present value. The word "potential" was, in fact, unnecessary, but it was put in, not to qualify "substantial value" but "building ground." Consider section 16 sub-sections 1 and 2 of the Act. This is the section dealing with mineral rights, which must have not merely a substantial value, but a reasonable prospect of being worked within twenty years. In the case of these lands, it is stated in the evidence that they may not be developed for 50 years. The real meaning of section 8 sub-section 3 (d) is that the lands sought to be excluded from the operation of the Act must have some inherent quality marking them out as building ground in contradistinction to their agricultural quality, and that such inherent quality must have a substantial value. If the question of the onus of proof arises, which it scarcely does in this case, it is clearly cast on the landlord, because under the Act the sale of all tenanted land is automatic: by section 8 sub-section 1 on the appointed day all tenanted land in Northern Ireland shall vest in the Land Commission subject to certain exceptions, and the landlord must prove that he comes within one of those exceptions: *Coffee* v. *Hamilton* (1) and *M'Cann* v. *Marquis of Downshire* (2), both cases on the construction of section 58 of the Land Law (Ireland) Act, 1881. But the question of the onus of proof has no reference to the value of

(1) 28 I.L.T.R. 151 (2) [1894] 2 I.R. 611

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4, 17.

evidence which is in question here: *Abrath* v. *North Eastern Railway Coy., Ltd.* (1).

In this case the Commissioners have found upon the evidence that the lands have not got a substantial value as building ground, and the Court, we submit, is bound by that finding, as it is on a new trial motion by the findings of a judge sitting alone. The present case is a rehearing in the sense that an appeal from a judge of the Chancery Division is: it is heard on the judge's notes, and the Court will not disturb the findings of the Court below unless it is satisfied that those findings were against the weight of evidence: *Colonial Securities Trust Co., Ltd.*, v. *Massey* (2) We submit that the judgment appealed from was right; the Commissioners have taken the correct and only view.

Moore C.J.

*Murphy K.C.* in reply.

In this case the discretion of the Court of Appeal is unfettered: *Gaffney* v. *Fetherstonhaugh* (3) and *Coghlan* v. *Cumberland* (4). There are no conflicting findings of facts, but merely expression of opinions.

The kernel of the case is the absence of weight attached to the word "potential" in the judgment of the Commissioners. As they did not pay attention to the word "potential," but gave all the force to the word "utility," their decision amounts to this, that qua "actual value" it is a line ball case. Then what is it qua "potential value"?

As regards the question of onus, the publication of provisional lists is the start of the machinery by which ultimately the lands will vest in the tenant: *The Queen* v. *Irish Land Commissioners* (5).

MOORE, C.J.: This appeal comes before us under section 16 (2) of the Northern Ireland Land Act, 1925, from an order of the Land Purchase Commission of the 11th February, 1926, whereby after considering the objections of the tenants to the exclusion of certain lands in the estate to be vested in them severally under the provisions of the statute, it was declared that the said lands

(1) 11 Q.B.D. 440 p 456
(2) [1896] 1 Q.B. 38
(3) [1900] 2 I.R. 417 p 426
(4) [1898] 1 Ch. 704
(5) [1894] 2 I.R. 394

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4, 17.

Moore C.J.

do not possess a substantial value or utility, whether potential or actual, as building ground, and the objections were accordingly allowed.

I preface this judgment by pointing out that this is an appeal contemplated by the Act both on questions of law and of fact; it is in the nature of a re-hearing, although we have a report of the evidence of the witnesses instead of seeing them before us, and we have a wholly unrestrained jurisdiction to deal ourselves with the case in any manner in which the Land Purchase Commission themselves could have done at the original hearing.

By section 8 of the Act all tenanted land in Northern Ireland shall vest in the Commission on the appointed day, and as speaking generally the Act is only to apply to lands substantially agricultural or pastoral, or partly agricultural or pastoral, or partly agricultural and partly pastoral, such vesting might hereafter be challenged if it were found that it were applied to lands not coming within any of the foregoing definitions.

To obviate this result, therefore, the Act, by section 17, provides for ascertainment by the Land Purchase Commission, prior to the vesting of all such lands, of the validity of any objections to the inclusion or exclusion of the lands from the subsequent vesting, and it was on such an inquiry into the validity of the tenants objections to provisional exclusion that the order appealed from was made.

The lands in question are situate at Dundonald; they are at present used as agricultural holdings; it is alleged that they have a prospective value—I deliberately do not quote the words of the section—as building land, and that therefore they fail to be excluded from vesting in the Commission by reason of section 8 (3) (d) of the Act, which is in these term: "This section shall not apply to (d) any holding which possesses a substantial value or utility whether potential or actual as building ground or is a town park."

Speaking generally this Act is an expropriatory Act—it divests the owner on each estate compulsorily of his property, in order to vest it in a Department of the State, and in my opinion it should be construed "where an equivocal word or ambiguous sentence leaves

C.A. 1926

LYLE'S ESTATE. MAY, 3, 4. 17.

a reasonable doubt as to its meaning which the canons of interpretation fail to solve " in favour of the person so to be expropriated, and this is especially the case where the question of compensation would arise.

The question of compensation is of importance here, because our tests of substantial value in the lands are precisely the same as those by which we would ascertain the amount of compensation if the lands were being taken under compulsory powers.

Moore C.J.

I agree with the Commissioner that the date at which the substantial value of the lands is to be ascertained is the moment of the inquiry, but the value of the lands at that moment may be largely enhanced by the fact that there is a future prospect of reproductive development before them. If I am right in holding that prospective value is to be included as an element in arriving at the present value, then indeed the use of the word potential is hardly necessary at all. In *Reg.* v. *Brown* (1), a case under the Lands Clauses Consolidation Act, 1845, Cockburn, C.J., observes—" A jury, whether the dispute be as to the value of land required to be taken by the company . . . in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market. That is the mode in which the land would be valued." Generally speaking I think the foregoing applies to the present case.

But to make the position more certain the Legislature ex abundanti cautela in the section under consideration have introduced after " substantial value or utility " the words " whether potential or actual."

I agree with Andrews, L.J., that the word " substantial " must govern " utility " as well as " value." What then is substantial, potential, utility? Potential, taken by itself, only means possible. I do not think that

(1) L.R. 2 Q.B. 630

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4, 17.

Moore C.J.

this can be the meaning here because, as has been pointed out to us, all agricultural or pastoral land is in that sense possible building ground. But I do not think that I could say that such lands wherever situate had necessarily a substantial utility. Taking " substantial " as equivalent to real, the utility must depend upon the probability that the lands will be put to the use specified. Again, I apply another rule of construction, and I say that if such probability is to be considered, it must be such a probability, as will come into esse within a reasonable time. Reasonable time is a question of fact; it is always a question for the jury; it must vary in each case, no rule can be laid down.

Again, in a case also under the Lands Clauses Act, *City and South London Railway Company* v. *Rector and Churchwardens St. Mary, Woolnorth* (1), the Court of Appeal, affirming Wright, J., held that the arbitrator might award compensation for severance, on the grounds that although the lands not taken by the company were the site of a church they might at some future time cease to be so, and be available for building, and that he (the arbitrator) was at liberty to draw his own conclusions as to when that time would be likely to arrive.. This was affirmed on appeal (2).

Speaking as judge of fact, I think the evidence before the Commissioner establishes the potential utility of these lands in the sense in which I have construed the expression within a reasonable time.

My brother Andrews has dealt exhaustively with the evidence, and I do not propose to recapitulate it further.

I have only to add that I do not think substantial value is the same thing as substantial utility. I do not see how there could be substantial value without utility, for I think utility for some purpose must be a necessary element in increasing value, but substantial utility, potential or actual, may not have at the moment any substantial value and the statute does not require that it should.

But every case must eventually be decided on its own facts. I certainly do not wish to lay down any fixed rule; but I would say that, in arriving at the meaning of substantial value, I would consider three things:—

(1) [1903] 2 K.B., 718 (2) [1905] A.C. 1

(1) the amount in moneys worth of the probable increase of value when it takes place;
(2) the period at which it would come into being; and its effect on present value.
(3) its proportion in value to the lands proposed to be excluded.

As to No. 2, an increase on a holding now paying £50 per annum of a further £50 per annum might be worth very little at present values if it was not to begin until after the next fifty years, *Metge* v. *Kavanagh* (1). ANDREWS L.J.

As to No. 3, an increase of £10 a year to lands producing £5 p.a. would beyond question be substantial, but an increase of the same figure to lands producing £100 might quite possibly not be held so to be.

In arriving at substantial utility I would take into consideration Nos. (2) and (3) of the foregoing elements.

I am of opinion, that in the circumstances, the appeal should be allowed with costs against the tenants, who objected to the exclusion of their holdings.

ANDREWS, L.J.: This case derives its principal importance from the fact that it is the first occasion upon which the opinion of this Court has been sought upon the construction of sub-section 8 (3) (d) of the Northern Ireland Land Act, 1925.

Before considering the terms of the sub-section in detail, a few words may not be out of place in reference to the general policy and scope of the Act. In many respects it introduces changes in the law of land purchase; but the most drastic and far-reaching modification which it effects is undoubtedly the general adoption of the principle of compulsory purchase which is to be found in section 8 of the Act. The tenant's right to purchase his holding through the medium of the Land Commission is conferred by statute, and is no longer dependent on the consent of his landlord. The Act evidences a genuine determination on the part of the Legislature to expedite the completion of Land Purchase in Northern Ireland.

By section 8 it is enacted that, subject as therein provided, all tenanted land in Northern Ireland shall on the appointed day vest in the Commission as if vesting orders had been made under section 16 of the Act of 1903 in

(1) I.R. 11 C.L 431

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4, 17.

AndrewsL.J.

pursuance of new purchase agreements entered into on the appointed day by the Commission. The expression "tenanted land" is defined in section 20 by its tenure, not by the character of the land; and the expression is, therefore, prima facie wide enough to include all land of every character held under the prescribed tenure. The scope of the section is, however, limited as regards the character of the holding by sub-section 3 of section 8, which specifies certain classes of holdings to which the section does not apply. Included by clause (d) in these excepted holdings is "any holding which possesses a substantial value or utility whether potential or actual as building ground." The question for our determination in the present case is whether certain holdings of the tenants, W. A. B. Ferguson, James Edward Gray, and Thompson Ferguson, or any of them, fall within this clause.

The differentiation of building land from ordinary agricultural land has, of course, long been recognised in the law of Irish Land Purchase. Thus by section 5 of the Land Law (Ireland) Act, 1881, the Court is empowered during the continuance of a statutory term to authorize the resumption by the landlord of the whole or part of a holding for the use of the ground as building ground. The present clause differs, however, in one important respect from section 5 of the Act of 1881. Under this latter section it was held by Meredith, J., in *Archbold* v. *Charters* (1), that the words "the use of the ground as building ground" meant actual user as distinguished from possible user. It was incumbent on the landlord to satisfy the Court that he had a clear, settled and definite purpose of converting the agricultural land, possession of which he was desirous to resume, and which was suitable for building upon, into building ground, if and when the order for resumption was made. In contradistinction to this section, clause (d) of section 8 (3) of the Act of 1925 expressly recognises potential as well as actual utility as building ground. This modification of the law in favour of the landlord was only a reasonable and natural set off to the introduction of the principle of compulsory purchase under which the landlord might be

(1) [1900] 2 I R 262

deprived of his rights in the holding against his will Under the Act of 1881 failure by the landlord to establish his right to resume possession for the use of the ground as building ground was no bar to a subsequent application when the landlord's clear, settled and definite purpose of converting the land into building. ground could be established. On the other hand, failure by the landlord to bring his case within one of the exceptions specified in section 8 (3) of the Act of 1925 results in a vesting of the land in the Commission, with a consequent vesting under section 12 in the tenant after the appointed day. In these circumstances the Legislature deemed it only reasonable to have regard to potential as well as to actual utility as building ground.

I pass now to the construction of clause (d) which certainly cannot be commended as a masterpiece of the draftsman's art. I agree with the Attorney-General when he says that it bears internal evidence of much negotiation and ultimate compromise. During the course of the arguments we have had different interpretations placed upon the words " substantial," "utility," and " potential." Doubts have been expressed as to whether the word " substantial " is intended to govern only the word "value" or both the words "value" and "utility." If the latter be the true intention of the Legislature, the difficulty has been pointed out of possessing something substantial, which it is contended points to the immediate present, and yet which under the section may be potential, a word which obviously relates to the future. To overcome this difficulty it has further been suggested that possibly the word " substantial " only qualifies the word " value," and that the words " whether potential or actual " are to be read in connection with the word " utility " only, and not with the word " value." Probably much, if not all, of the difficulty in construction would have been absent had the words " potential or " actual " been transposed so that the clause would have read " any holding which possesses a substantial value or utility as actual or potential building ground." This sequence of words would at least have overcome some of the diffculties, without doing violence to what I conceive to be the intention of the Legislature. Taking the words, however, as we find them in the section, the

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4, 17.

AndrewsL.J.

word " substantial " is, of course, purely a relative term, per Ashurst, J., in *R.* v. *Stuffs* (1). It means in the connexion in which we find it something " real," or, to define it by negatives, something " not seeming, imaginary, or illusive." In the next place, I am satisfied that the word " substantial " must be read as qualifying both the words " value " and " utility." Grammatically, this is in my opinion the necessary consequence of the omission of the indefinite article before the word " utility "; and it seems to me that we would be setting at defiance the intention of the legislature were we to hold, without any apparent reason for the distinction, that, whilst " value " as building ground must be substantial, " utility " might be merely seeming, imaginary or illusive. The whole safeguard which the tenant possesses against unfounded claims for resumption based on imaginative utility of the holding as building ground would disappear. There must be some substance or reality in the utility or in the value alleged before the tenant can be deprived of his statutory right to purchase his holding through the Land Commission. When precisely a landlord could succeed in showing a substantial utility without a substantial value, or a substantial value without a substantial utility, I do not stop to inquire. It may be that the draftsman would again have better achieved his object had he substituted for the words a " substantial value or utility " the words " a substantial value in respect of its utility "; but, whether this be so or not, I am satisfied that the Legislature never intended that the landlord should be entitled to deprive the tenant of his rights unless he satisfied the Court that there was substance or reality in the claim which he made. The Court, before yielding to his contention, must be satisfied that, if put up for sale at the time that the Court is investigating the case, the holding would fetch a substantially or appreciably, not merely a negligibly, larger sum that it would realise as ordinary agricultural land by reason of the value or utility which it possesses either actual or potential as building ground.

I am further of opinion that the words " whether potential or actual " must be read as qualifying or enlarging both the words " value " and " utility." In

(1) 2 T.R. 395

this opinion I think I am supported by section 23 (2) of the Act, where, in using the same phrase as in section 3 (3) (d), the words "whether potential or actual" are enclosed in brackets. Though punctuation and brackets do not, strictly speaking, form parts of a statute, they can be legitimately regarded as contemporanea expositio. *Claydon* v. *Green* (1) and *Devonshire* v. *O'Connor* (2).

On whom does the burden of proof of this issue lie? Does it rest with the landlord to show that the holding possesses this special value or utility, or with the tenant to show that it does not? When so stated the question appears almost to answer itself. I can see nothing to justify a departure from the application of the general principle—Affirmanti non neganti incumbit probatio. The onus of bringing the case within this exception to section 8 of the Act of 1925 falls upon the landlord, just as it fell, generally speaking, upon him to bring the holding within one of the exceptions contained in section 58 of the Land Law (Ireland) Act, 1881. *Coffee* v. *Hamilton* and *Gradwell* v. *M'Cullagh* (3) and *M'Cann* v. *Marquis of Downshire* (4). It never could have been the intention of Parliament, as contended by Mr. Murphy, that the onus should rest on the party, be he landlord or tenant, who objects to the inclusion or non-inclusion of the lands in the provisional lists referred to in section 17 (2) of the Act of 1925, for this would attach quite an undue importance to a decision of the Commission which in terms was provisional only, and which had been arrived at in ignorance possibly of many important facts, and without the assistance of the legal advisers of the parties interested. The onus of proving that the land is excluded from the statute arises from the terms of the statute itself, and not from a provisional decision of the Land Commission. The untenable character of Mr. Murphy's contention is best illustrated by the fact that, whilst assigning such importance to the provisional finding of the Land Commission which was in his favour, he cited to us *Gaffney and Fetherstonhaugh* (5) and *Coghlan* v. *Cumberland* (6) as authoritative decisions on our wide powers of reviewing the considered but adverse decision of that same tribunal

(1) L.R. 3 C.P. 511, p 522
(2) 24 Q.B.D 468, p 478
(3) 28 I.L.T.R. 151 and 152
(4) [1894] 2 I.R. 611
(5) [1900] 2 I.R. 417 p 426
(6) [1898] 1 Ch. 704

C.A. 1926.

LYLE'S ESTATE. MAY, 3, 4 17.

which is now under appeal on questions of fact as well as of law.

I pass from these legal topics to the facts of the present case.

[Lord Justice Andrews having summarized the evidence as above set out proceeded :—

Best L.J.

In these circumstances, the Commissioners held that the lands in question had a value or utility as building ground, but they felt that they must decide against the landlord, because from the divergent estimates which they received they were unable to say whether the lands were likely to be utilized in near future as building ground. I think the use of this expression " near future " supports Mr. Murphy's contention that the Commissioners did not attach sufficient weight to the word " potential." Notwithstanding this they considered it a line ball case. Having carefully considered the general and special features of the case to which I have referred, and the evidence of the several witnesses who were examined, I am of opinion that, whilst there must from the inherent nature of the case be some doubt as to when building will commence or be completed on the lands, the landlord has discharged the onus which the law casts upon him, and has satisfied me that the value or utility which the lands possess for building purposes is of a substantial character within the sub-section referred to.

The appeal must, therefore, be allowed, with costs.

BEST, L.J. : In this case the opinion of the Court is asked as to the true construction of section 8, sub-section (3) (d) of the Northern Ireland Land Act, 1925, and whether on that construction certain lands are included in or excluded from the purchase provisions of the Act.

Section 8 enacts that, subject as therein provided, all tenanted land in Northern Ireland shall on the appointed day vest in the Commission as if vesting powers had been made under section 16 of the Irish Land Act, 1903, in pursuance of new purchase agreements entered into on the appointed day by the Commission.

Section 20 of the Act defines tenanted land, and prima facie all land of the tenure set out in section 20 comes within the scope of the compulsory purchase provisions of the Act. Certain classes of holdings are, however,

excepted from those provisions. These classes are set out in detail in sub-section (3) of section 8, and it is with one of the classes so excepted that this appeal is conversant.

Clause (d) excepts from the operation of this section "any holding which possesses a substantial value or utility whether potential or actual as building ground," and the question we have to determine is whether certain holdings or parts of holdings of three tenants, W. A. B. Ferguson, Thompson Ferguson, and J. E. Gray, or any of them, fall within the exception.

Best L.J.

It was argued on behalf of the landlord that the word "substantial" applied to or qualified "value" only and not "utility," and that the word "potential" as well as the word "actual" applied both to "value" and to "utility." Against this view it was contended for the tenants that "substantial" applied to or qualified "utility" as well as "value," that the words "substantial value" are the governing words in the clause, and that, if the word "potential" cannot stand with or be read along with the words "substantial value," then that word must be ignored. "Potential" means being in possibility, not in actuality, latent, or that may be manifested, and to my mind there is no more difficulty in reading "potential" along with "substantial value" than there is in reading "actual" along with the same words. I further think that "substantial" qualifies "utility" as well as "value."

That the words "whether potential or actual" apply is borne out by the provisions of section 23 (2) of the Act, where the words used are the same as those which we are asked to construe and where the words "whether potential or actual" are enclosed in brackets. This matter was not referred to argument, but the attention of the Lord Chief Justice and myself is called to the point by our brother, Lord Justice Andrews.

What is the meaning of the word "substantial" whether applied to "value" or "utility"? "Substantial" is, with other meanings, defined as actually existing, real, not seeming or imaginary, true, genuine, having substance or strength, and the allegation for the landlord is that the lands have a substantial value, whether potential or actual, or have a substantial utility, whether

C.A. 1926

LYLE'S ESTATE. MAY, 3, 4, 17.

potential or actual, as building ground in either case, whilst the tenants argue contra. For the reasons stated later on I think the landlord's submission is correct.

A considerable portion of the argument was directed to the question of the burden of proving that the holdings in question are excepted from or included in the operation of the compulsory purchase provisions of the Act.

Best L J.

Prima facie all tenanted lands of the tenure mentioned in section 20 of the Act come within its scope, and any one who asserts the contradictory proposition as to any particular parcel of land must be called upon to prove it. I hold, therefore, that the onus in this case is clearly on the landlord to show that the holdings come within one of the exceptions to section 8 of the Act.

I come now to deal very shortly with the facts of the case. The lands in question are situate near the village of Dundonald, the nearest point of Mr. W. A. B. Ferguson's land being just under a quarter of a mile from the village. The lands of the other two tenants are close by. Dundonald is in or about a mile from the Dundonald tram terminus, and is on the main road from Belfast to Newtownards. This is a magnificent thoroughfare, and is amply served by the motor charabancs which are such a feature of present day life. Building operations have been speeded up very considerably in Belfast in the past year or two, and the city is rapidly extending in the direction of these lands. This last movement is, no doubt, stimulated to a large extent by the acquisition of Stormont Castle and Demesne as a residence for the Prime Minister and a site for the Parliament buildings and extensive government offices of Northern Ireland. It is said that the approach to the lands is so steep as to make it unlikely that people should desire to acquire sites for building there and that they are too far from the road, but I cannot accept this view, and it is also said that the extra cost of getting materials to the site would prohibit building, and that no one would think of building in a place where there are no supplies of light or water and no sanitary arrangements available. In view of what is proved to be happening in the near neighbourhood, there is not any great substance in these contentions.

All the expert witnesses on both sides agree, or at any rate do not dispute, that the lands have a value for building purposes.

The Commissioners in their judgment think it has been shown that the lands in question have a value or utility as building ground, and that it is common ground that they have this value or utility though they are not satisfied that this value or utility is a substantial one as viewed at the present time, and they have arrived at this conclusion with some hesitation.

Best L.J.

In disallowing the landlord's objection that these lands have a substantial value or utility whether potential or actual as building ground the Commissioners have, in my opinion, omitted to take sufficiently into account the potential value or utility which they may possess. In my judgment, the lands do possess a potential substantial value or utility, if not an actual substantial value or utility, as building ground, and if this be so, the conclusion arrived at by the Commissioners is wrong and should not be allowed to stand.

I have no doubt that this Court, in a case like the present, has the right to differ from the Commissioners on questions of fact as well as on questions of law, whilst the utmost respect and the most careful consideration should be given to the findings of fact of the very experienced and competent Commissioners who heard the case.

I agree that the Appeal should be allowed with costs.

Solicitor for Colonel Lyle : *S. S. & E. Reeves & Sons.*

Solicitors for the tenants : *Messrs. Todd & Mark* and *Messrs. Galway & Hawthorne.*

A. A. C.

C. A.
1925.
Dec., 17.

1926.
Feb., 3.

[IN THE COURT OF APPEAL.]

## BRUCE v. JACKSON (1).

*Landlord and tenant—Ejectment to recover part of a mountain holding for use as turbary—Expiration of second statutory term—Present tenancy—"Conditions" of tenancy—Incidents" of tenancy—Notice to Quit (Ireland) Act, 1876 (39 & 40 Vict., c. 63), sect. 3—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49) sect. 5—Land Law (Ireland) Act, 1896 (59 & 60 Vict., c. 47) section 3 (1).*

A landlord after the expiration of a second statutory term brought an action of ejectment founded on notice to quit under section 3 of the Notice to Quit (Ireland) Act, 1876, for part of a mountain holding, consisting of a turf bog, with a view to its use and development for the purposes of turbary. The defendant was a present tenant of the lands.

*Held*, that upon the true construction of section 5 of the Land Law (Ireland) Act, 1881, the tenant's right to retain possession of a holding in which a present tenancy existed was an incident of the tenancy and not one of its statutory conditions, that such incident is not preserved for the benefit of the tenant by section 3 (1) of the Land Act of 1896, and accordingly that the plaintiffs were entitled to maintain the action under section 3 of the Notice to Quit (Ireland) Act of 1876, and that this right was in no way prejudiced or affected by the provisions of the Land Acts of 1881 and 1896.

Case Stated for the opinion of His Majesty's Court of Appeal in Northern Ireland by Moore L.J., at the County of Londonderry Summer Assizes as follows:—

This case came before me as Judge of Assize for the County of Londonderry on July 24th, 1925.

The action was brought in ejectment founded on notice to quit to recover part of a mountain holding in the defendant's occupation.

I refer to the process which is to be taken as part of this case.

The title of the plaintiff as landlord being tenant in tail in possession of the Clothworkers Estate was admitted. Leech, K.C., and J.G. Dougherty appeared for the plaintiffs. Murphy, K.C., and M'Guckin for the defendant.

It was admitted that the plaintiffs served the notice to quit to which I refer, dated the 10th October, 1923, and no point arises as to its validity apart from its effect

(1) In the Court of Appeal before Andrews and Best, L.JJ.

Leech stated that the notice to quit was brought under Sec. 3 of the Notice to Quit Act, 1876, to recover 311a. 2r. as shown on map, which is also incorporated in this case. The defendant is in possession of the holding consisting of 865a. 3r., of which the 311 acres form part.

The defendant is a present tenant. A fair rent at £28 was first fixed by agreement, dated 14th October, 1882, and filed in the Court of the Land Commission on February 6th, 1883, and subsequently by a second agreement dated 20th March, 1897, and filed similarly on 23rd October, 1897. I refer to each. The plaintiffs have and exercise the right of setting turf banks on the defendant's holding to tenants and others on the Clothworkers Estate, and the defendant has the right of cutting enough turf on the holding for his own purposes. There was, admittedly, no interference by the defendant with the plaintiffs or their licencees in the exercise of their turbary rights.

The plaintiffs wish to get this portion into their own possession so as to develop and regulate its use as turbary.

The plaintiffs will gain financially by doing so; the the defendant will lose to a certain amount by losing an acreage of rough grazing which he and his witnesses stated had a special value to him as a large sheep farmer, but presumably will receive adequate compensation if the plaintiffs succeed.

The Notice to Quit Act of 1876, Sec. 3, does not impose on the plaintiffs any duty to show that determination of the tenancy in whole or part is meritorious or even reasonable.

Leech, K.C., stated that plaintiffs were entitled to proceed under the Act of 1876 instead of under Sec. 5 of the Land Law (Ireland) Act, 1881; he argued that the provision against disturbing the tenant in Sec. 5 of that Act was limited in duration to the existence of the statutory term; that in the present case the defendants statutory term had expired; that the right of not being disturbed was " an incident " and not " a condition " of a statutory tenancy, and these were not continued after the expiration of the term by Sec. 3 (1) of the Land Law Ireland Act, 1896, which carried on " conditions " only. Murphy, K.C., contra.

C.A. 1925.

BRUCE v. JACKSON.

I was of opinion that the provisions of Sec. 3 of the Notice to Quit Act, 1876, could not be put in force against a present tenant holding under statutory conditions, as I found the defendant to be, but at the request of Leech K.C. I reserved my decision until the opinion of this Honourable Court could be taken on the matter.

The question of law is whether or not on the foregoing findings of fact the plaintiffs are entitled to succeed.

If the Court so decides the D.W.P. will be reversed and there will be a decree for possession with £4 16s 6d costs in the Court below, and of £7 8s 8d of this appeal and seven guineas witnesses expenses.

If the Court holds that the plaintiffs are not so entitled the D.W.P. will be affirmed with £6 17s 9d costs of the appeal and £3 3s 0d witnesses expenses.

*Leech K.C.* and *J. G. Dougherty* for the plaintiffs :—

The right of ejectment is only stayed if at all, while the statutory term exists. Even if an ejectment does not lie after the expiration of the statutory term as to the whole of the holding, yet there is nothing to prevent an ejectment as to part only, under section 3 of the Notice to Quit Act, 1876, either during the existence of the statutory term, or after such term has expired. We submit that the governing words of section 5 of the Land Law (Ireland) Act, 1881, are the words which come at the very outset " during the existence of a statutory term in his tenancy," and that the restriction imposed by section 5 is strictly confined to the fifteen year term of tenancy. The right of not being disturbed is an " incident " and not a " condition," of a statutory tenancy. The marginal note to section 5 of the Land Law (Ireland) Act, 1881, " Incidents of tenancy subject to statutory conditions," although not part of the Act should be looked at by the Court, *Bushell* v. *Hammond* (1). In that case Collins M.R. says, at p. 1,007. " The side note, also, although it forms no part of the section, is of some assistance, inasmuch as it shews the drift of the section." To the same effect is *Smith* v. *Portsmouth Justices* (2), where the side note to section 11 of the Licensing Act, 1902,

(1) 73 LJ. (K.B.) 1005 (2) 75 LJ (K.B.) 851

was looked at. In *Nicholson* v. *Fields* (1) the marginal note was also looked at. We submit that the "incidents" of tenancy are (a) fixity of rent and (b) fixity of tenure. "Incidents" benefit the tenancy, conditions detract from it. The "conditions" but not the "incidents" are, we maintain, preserved on the termination of the statutory term by section 3 (1) of the Land Law (Ireland) Act, 1896. We rely on this section, for it actually refers to one of the incidents (fixity of rent). We would have been entitled to eject the defendant from part of the holding either during the continuance of the statutory term or afterwards under section 3 of the Notice to Quit (Ireland) Act, 1876. There has been no implied repeal of section 3 of the Notice to Quit (Ireland Act, 1876. In *Kutner* v. *Phillips* (2), A. L. Smith, J., said at p. 272, "Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied." The law is stated in similar terms by Shearman J. in *Fox* v. *Pett* (3) at p. 206, and in *Garnet* v. *Bradley* (4) by Lord Blackburn at p. 966. In the present case there is no inconsistency which could effect a repeal. The law on the subject will be found summarized in Maxwell on the Interpretation of Statutes (6th edition) at pp. 501-502.

It was open to the defendant to have applied to have a third term rent fixed, which would have effectually stopped the present proceedings. It would be a strange anomaly if there were to be a right of resumption during a statutory term, but no such right after the term had expired.

*E. S. Murphy K.C.* and *Porter* for the defendant:—

The marginal note should not be referred to. The question whether such note can be read by the Court was not argued in the cases quoted on behalf of the plaintiff. On this point we rely on the judgment of Phillimore L.J. in *In re Woking Urban District Council (Basingstoke Canal) Act, 1911* (5). It is obvious from his judgment that Phillimore L.J. was of opinion that

(1) 31 L.J. N.S. (Ex.) 233
(2) [1891] 2 Q.B. 267
(3) [1918] 2 K.B. 196
(4) 3 A.C. 944
(5) [1914] 1Ch. 300

C.A. 1925.

BRUCE v. JACKSON.

" the general rule of law as to marginal notes, at any rate in public general Acts of Parliament," was that such notes could not be referred to, " upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons."

In Stroud's Judicial DNictionary (2nd edition) we read that " A thing is ' incident ' to another when it appertains to, or follows on, that other which is more worthy, or principal."

Fixity is a " condition " and not an " incident " of the tenancy. We rely on *Callwells*, Landlords; *Reilly*, Tenant (1), and especially on the judgment of Holmes, L.J., at pp. 128, 129, 130. We also rely on the judgment of Cherry, L.J., at pp. 132, 133. The effect of section 3 (1) of the Land Law (Ireland) Act, 1896, is to continue the rights of the parties just as they were before the expiration of the statutory term. The landlord could have applied to have a fair rent fixed under section 8 (1) of the Land Law (Ireland) Act, 1881. We submit that the tenancy is continued under section 3 (1) of the Land Law (Ireland) Act, 1896, and that in any case that section, coupled with the decision in *Callwells*, Landlords; *Reilly*, Tenant (1) is amply sufficient to protect the defendant. The incorporation of the Landlord and Tenant (Ireland) Act, 1870, which is effected by section 48 (1) of the Land Law (Ireland) Act, 1896, is very qualified. The " statutory conditions " are all specific obligations put upon the tenant. The plaintiff is attempting to carry on the obligations on one side without continuing those on the other. The word " condition " is a very general term. As to the meaning of the word "incidents," we ask the Court to disregard the marginal note. We submit that the view expressed by Moore C.J. that the provisions of section 3 of the Notice to Quit (Ireland) Act, 1876, could not be put in force against the defendant is correct.

*Leech K.C.* (in reply).

Section 8 (1) of the Land Law (Ireland) Act, 1881, draws a distinction between "incidents" and "conditions" of a tenancy. We contend tht *Callwells*, Landlords; *Reilly*, Tenant (1) is in our favour.

*Cur. adv. vult.*

(1) [1910] 1 I.R 121

C.A. 1926.

BRUCE v. JACKSON.

FEB., 3

ANDREWS, L.J.: This case came before us on a Case Stated by the Lord Chief Justice (then Lord Justice Moore) sitting as judge of assize for the County of Londonderry at the last summer assizes. The action was brought in ejectment founded on notice to quit to recover possession of part of a mountain holding in the occupation of the defendant. The defendant's holding consists of 865 acres 3 roods, of which the 311½ acres, constituting the subject matter of this ejectment, form part. The defendant is a present tenant. A fair rent of £28 was first fixed by agreement on 14th October, 1882, and this was reduced by an agreement dated 20th March, 1897, to £24, subsequently adjusted at £22 11s 10d. The plaintiffs, whose title as owners of the reversion is admitted, have and exercise the right of setting turf banks on the defendant's holding to tenants and others on the Clothworkers Estate, and the defendant has an admitted right of cutting turf on the holding for his own purposes. The plaintiffs wish to recover possession of this 311½ acres so as to develop and regulate its use as turbary.

The notice to quit, dated 10th October, 1923, was brought under section 3 of the Notice to Quit (Ireland) Act, 1876, and required delivery up on 1st November, 1924, of possession of the lands, which were therein described as consisting of a turf bog, with a view to their use and development for the purpose of turbary. The notice was duly served, and the only point which arises is as to its legal effect.

It will be observed that the second statutory term expired in the year 1912. Neither party has applied since that date to have a third term rent fixed.

The plaintiffs' case was presented by Mr. Leech with great clearness, force and ability. His arguments were twofold. In the first place, he contended that the right of ejectment is suspended by section 5 of the Land Law (Ireland) Act, 1881, during the continuance of the statutory term only; that on its expiration the tenancy becomes, by virtue of section 3 (1) of the Land Law (Ireland) Act, 1896, a present tenancy, subject to the same rent and conditions (including the statutory conditions)

C.A. 1926.

BRUCE v. JACKSON.

as during the statutory term; that the tenant's right to retain possession of a holding is one of the "incidents" of a tenancy for a statutory term, and not one of its "conditions"; and that such incident is not preserved for the benefit of the tenant by section 3 (1) of the Act of 1896. Secondly, he submits that, even if ejectment does not lie as to the entire holding after expiration of the statutory term, there is nothing to prevent ejectment under section 3 of the Act of 1876 as to part only of the holding, either during or after the expiration of the statutory term.

In answer to these arguments, Mr. Murphy contended on behalf of the defendant that the right to retain possession of the holding is a "condition" of the tenancy for a statutory term; that, as such, it was continued by section 3 (1) of the Act of 1896; and that the provisions of section 3 of the Act of 1876 could not be put into operation against a present tenant holding under statutory conditions.

Section 3 of the Act of 1876 provides that where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of certain specified purposes, including turbary, and the notice to quit so states, it should by virtue of the said Act be no objection to the notice that it relates to part only of the holding. It is clear that if this section remains unrepealed and unaffected by subsequent legislation the plaintiffs are entitled to maintain their action. The defendant, however, relies on the joint operation of section 5 of the Act of 1881 and section 3 (1) of the Act of 1896. The first of these two sections defines the position of a tenant during the continuance of a statutory term. The latter sets out the characteristics of a tenancy on and after the expiration of a statutory term; but, as it does so by reference (inter alia) to "the same conditions . . . . as during the statutory term," it becomes necessary for us to examine the provisions of the former section first. It reads as follows:—

> "A tenant shall not, during the continuance of a statutory term in his tenancy, be compelled to pay a higher rent than the rent payable at the commencement of such term, and shall not be compelled to quit the holding of which he is tenant except in consequence of the breach of some one or more of the conditions following (in this Act referred to as statutory conditions)."

Then follow the statutory conditions which I shall summarise thus :—

(1) The tenant shall pay his rent.
(2) The tenant shall not commit persistent waste.
(3) The tenant shall not without consent subdivide or sublet his holding, or erect any dwelling-house thereon save as therein provided.
(4) The tenant shall not do any act whereby his tenancy becomes vested in an assignee in bankruptcy.
(5) The landlord (making reasonable amends for damage) shall have the right to enter upon the holding for certain specified purposes including the cutting of turf.
(6) The tenant shall not on his holding without consent open any house for the sale of intoxicating liquors.

Pausing here for a moment, we must ask ourselves what, according to the ordinary acceptation of language, may fairly be described in section 3 (1) of the Act of 1896 as "the conditions . . . during the statutory term." It seems to me that without any further guidance than the words which I have read one would say that the "conditions" and the only "conditions" in the fifth section of the Act of 1881 are those numbered 1-6 supra, which are expressly referred to as " statutory conditions." It would, in my opinion, be a singular and clumsy method of draftsmanship, if the same section as set out seriatim the conditions of a tenancy during the continuance of a statutory term and referred to them as "statutory conditions" contained other additional "conditions" of the tenancy; yet this is the argument for the defendant, whose counsel contend that the fixity of tenure granted by the words "and shall not be compelled to quit the holding of which he is a tenant" is a "condition" of the tenancy. Draftsmanship would, indeed, be remarkable which conferred on a tenant during the continuance of a statutory term a "condition"—fixity of tenure—"except", to quote the words of the section, "in consequence of the breach of" other specified conditions.

In truth, the words which I have referred to as conferring a fixity of tenure are not words of condition. In *Termes de la Ley*, which was described by *Bayley J.* (5 B. & C. 229), as " as a book of great antiquity and accuracy," a " condition " is defined as " a restraint or bridle annexed and joyned to a thing, so that by the not performance or not doing thereof the partie to the condition shall receive

C.A. 1926.

BRUCE v. JACKSON.

prejudice and losse, and by the performance and doing of the same, commoditie and advantage." In *Shepherd's Touchstone*, a "condition" is described as "a clause of restraint in a deed, or a bridle annexed and joined to an estate staying and suspending the same, and making it uncertain whether it shall take effect or no." Both these definitions are authoritatively cited in *Stroud's Judicial Dictionary*, 2nd Edit., 363-4. The words of section 5 which confer fixity of tenure do not fall within either definition. We find still further corroboration of the view that fixity of tenure is not a condition from an examination of the conditions which are described as such in section 5: for they all possess the common characteristic of imposing a burden or restraint upon the tenant, whereas fixity of tenure is in the nature of a privilege, benefit, or right. It appertains to or is a part of the contract of tenancy; it is not a condition of the existence of the contract. It is one of its terms or features, a property, circumstance, or, better still, an incident of the tenancy. This is what it is called in the marginal note, but I refer to that note with hesitancy, lest it may be suggested that I have yielded to Mr. Leech's argument that the Court may invoke the aid of marginal notes in the construction of statutes. This, in my opinion, it cannot do, for which conclusive authority will be found, if required, in the speech of Lord Cairns in *Lang* v. *Kerr Anderson & Company* (1) in the observations of Bramwell, James, and Baggallay, L.JJ., during the course of the arguments in *Atty. Gen.* v. *Gt. Eastern Rly. Co.* (2), of Jessel, M.R., in *Sutton* v. *Sutton* (3), and in our own court in the judgment of Moore C.J. in *Maguire* v. *Day* (4). For my own part I regard a marginal note in a statute very much as I do the head note of a case in our Law Reports. It is an abstract or abbreviated statement intended to catch the eye. Both may be looked at or alluded to for convenience of reference; but in my opinion the marginal note can no more be relied upon in the construction of an ambiguous section of an Act of Parliament than the head note of a reported

(1) 3 A.C. 529 at p 536
(2) 11 Ch.D. 449 at p 460, 461, 465
(3) 22 Ch.D. 511 at p 513
(4) [1926] N I. 86

case can be cited for the purpose of qualifying, extending, or even interpreting the judgments. Many instances could be cited in which both headnotes and marginal notes are not only misleading but inaccurate, and they are in my opinion alike unauthoritative.

I would further point out that for the use of the term "incident" in the Act we are not dependent merely on a marginal note. It will be found also in conjunction, yet in contrast, with the term "statutory conditions" in section 8 (3) of the Act of 1881, and in a context fully consistent with its being intended to include the important feature of fixity of tenure.

For these reason I have formed my opinion as to the true construction of the fifth section of the Act of 1881, and, in particular, as to what may properly be described as "the conditions of a tenancy during the statutory term" without reference or regard to the terms of the marginal note. Having done so I do not hesitate to say that the note is in my opinion perfectly accurate, and that fixity of tenure for the statutory term is an "incident", not a "condition" of the tenancy.

I may say that I find support for the view which I have expressed in section 3 (1) of the Act of 1896, already referred to. Fixity of tenure is a benefit for the tenant; a condition is a burden on his interest. The material words of the section are "subject to the same . . . conditions"; the words "subject to" are appropriate words for attaching burdens, but wholly inappropriate words for conferring benefits.

It was argued that the use in the section of the words "conditions (including the statutory conditions)" shows that the Legislature intended to give a wider meaning than it might naturally bear to the word "conditions"; that it obviously contemplated the existence of conditions other than statutory conditions; and that one of such conditions might, therefore, fairly be said to be fixity of tenure. This argument is, I think, sufficiently answered by the preceding paragraph of this judgment. But it further loses all its weight when it is remembered that there might well be, and there frequently are, conditions properly so called other than statutory conditions attached

C.A. 1926.

BRUCE v. JACKSON.

to a tenancy after the expiration of the statutory term, as, for example, when a fair rent has been fixed on leasehold premises under section 1 of the Land Act of 1887. This is the effect of the judgment of Palles, C.B., in *Bruce* v. *Steen* (1), and of Fitzgibbon, L.J., in *O'Connor* v. *Smith* (2). We can, therefore, find ample subject-matter for the word "conditions" in Section 3 (1) of the Act of 1896 without being driven to the necessity of attaching to it a wholly unwarranted and unnatural meaning.

The opinion which I have formed upon the first branch of Mr. Leech's argument renders it unnecessary for me to add anything regarding the other legal argument which he addressed to us. I hold that, in the circumstances established in this case, the plaintiffs are entitled to maintain their action under section 3 of the Act of 1876 for the recovery of possession of portion of the defendant's holding for the purpose of turbary; and that this right is in no way prejudiced or affected by the provisions of the Acts of 1881 and 1896.

We answer the question of law submitted to us in the affirmative, and allow the plaintiffs twenty guineas costs in this Court.

BEST, L.J.: This matter comes before us on a Case Stated by the Lord Chief Justice sitting as judge of assize for the County of Londonderry in July, 1925. The appellants brought a civil bill ejectment for overholding founded on notice to quit, to recover part of a mountain holding in the defendant's occupation. This holding, of which the defendant is a present tenant, consists of 856 acres 3 roods and 15 perches or thereabouts and the part sought to be recovered, and which is the subject matter of the ejectment, contains 311 acres and 2 roods or there abouts.

A fair rent of £28 for the holding was fixed by agreement and declaration, dated 14th October, 1882, and filed on 6th February, 1883, and by a second agreement and declaration made on 20th March, 1897, and filed on 23rd

(1) 14 L.R.I. 408 at p 426 (2) 20 L.R.I. 393 at p 400

October, 1897, a second term fair rent of £24 was fixed for the holding. This rent was subsequently adjusted to £22 11s 11d.

The second statutory term came to an end in 1912 and no other statutory term has been created.

The plaintiffs are owners of the reversion expectant on the determination of the tenancy, and it is admitted that they have and exercise the right of setting turf banks on the defendant's holding to tenants and others on the Clothworkers' Estate, and the defendant has the right of cutting enough turf on the holding for his own purposes. There was no interference by the defendant with the plaintiffs or their licensees in the exercise of their turbary rights.

Plaintiffs wish to get into their possession the portion of the holding sued for, so as to develop and regulate its use for turbary. The notice to quit, dated 10th October, 1923, was brought under Section 3 of the Notice to Quit (Ireland) Act, 1876, and required delivery up on 1st November, 1924, of possession of the lands described as consisting of a turf bog "with a view to the use and development thereof for the purpose of turbary."

The notice was properly served, and the only question is as to its legal effect.

The arguments presented to the Lord Chief Justice by Counsel for the parties were similar to those used before us and will be indicated later. The Lord Chief Justice was of opinion that the provisions of section 3 of the Notice to Quit (Ireland) Act, 1876, could not be put in force against a present tenant holding under statutory conditions which he found the defendant to be, but at the request of Mr. Leech, K.C., reserved his decision until the opinion of this Court could be taken on the matter; and the question of law is, whether on the findings of fact in the case the plaintiffs are entitled to succeed? Mr. Leech argued before us that plaintiffs were entitled to proceed under the Act of 1876. He contended that the right of ejectment is only stayed, if at all, while the statutory term exists, i.e., that the right of ejectment is suspended by section 5 of the Land Law (Ireland) Act, 1881, during a statutory term only; that the tenancy after

C. A. 1926.

BRUCE v. JACKSON.

the expiration of the statutory term is by virtue of section 3 sub-section (1) of the Land Law (Ireland Act, 1896, thenceforth a present tenancy subject to the same rent and conditions (including the statutory conditions) as during the statutory term; that in the present case the defendant's statutory term had expired; that the right of not being disturbed in the possession of the holding is an "incident" and not a "condition" of a statutory tenancy, and that such an "incident" once the statutory term has expired is not continued by section 3 sub-section (1) of the Act of 1896, which carried on or continued "conditions" only but not " incidents." Mr. Leech further contended that if upon the expiration of a statutory term, ejectment does not lie for the entire holding, yet under section 3 of the Act of 1876 it lies as to part only of the holding, both during a statutory term and after its expiration.

Mr. Murphy, in answer to these arguments, urged that the right to retain possession of the holding is a "condition" of the tenancy during a statutory term; that by virtue of section 3 subsection (1) of the Act of 1896, this condition still attaches to the tenancy after the expiration of the statutory term; and that the provisions of section 3 of the Act of 1876 could not be invoked against a present tenant holding under statutory conditions.

Section 3 of the Act of 1876 provides that where on a tenancy from year to year notice to quit is given by the landlord with a view to the use of the land for certain specified purposes, one of which is turbary, and the notice to quit so states, then by virtue of the Act it shall be no objection to the notice that it relates to part only of the holding. Plaintiffs' counsel rely on this section and say that defendant is not protected from its operation, but defendant's counsel contend that by the combined effect of section 5 of the Act of 1881 and section 3 sub-section (1) of the Act of 1896 plaintiffs right or ejectment is gone.

During the continuance of a statutory term in a tenancy a power of resumption of the holding or part thereof for some reasonable and suffcient purpose having relation to the good of the holding or of the estate, including certain named purposes, is given to the landlord on the conditions mentioned in the section.

Upon the expiration of a statutory term and until a new one is created, is the tenant protected from ejectment? In my opinion he is not so protected, but is in that respect in the same position as he was in before the statutory term was created.

Section 3 sub-section (1) of the Land Law (Ireland) Act, 1896, provides that "On the expiration of a statutory term in a present tenancy the tenancy shall continue a present tenancy subject to the same rent and conditions (including the statutory conditions) as during the statutory term until the tenancy is determined or a new statutory term for the holding begins," and there are other provisions which it is not necessary to cite.

What rights were preserved to the tenant by this sub-section? His rights so preserved were that he should have a present tenancy, subject to the same rent and conditions (including the statutory conditions) as during the statutory term, and the question for decision in this case is, whether freedom from ejectment as to part of the holding, the subject of the tenancy, has been secured to the tenant by the sub-section? In my opinion it has not.

It will be observed that under section 5 of the Act of 1881 a tenant shall not during the continuance of a statutory term in his tenancy be compelled to pay a higher rent than the rent payable at the commencement of such term and shall not be compelled to quit the holding of which he is tenant except in consequence of the breach of some one or more of the conditions following (in this Act referred to as statutory conditions); that is to say, and the six statutory conditions are then set out.

I do not propose to analyse these conditions further than to say that they all enforce obligations on the tenant or are limitations on his use of the holding or his method of dealing with it.

In section 3 sub-section (1) of the Act of 1896 it is provided that on the expiration of a statutory term in a present tenancy the tenancy shall continue a present tenancy subject to the same rent and conditions (including the statutory conditions) as during the statutory term, etc.

Freedom from ejectment is not one of the statutory conditions. Is it included in the "conditions" which

C. A. 1926

BRUCE v. JACKSON.

are defined as including the statutory conditions? I think not. When the Legislature wished to say that a tenant should have a certain fixity of tenure it said so, as in the early words of section 5 of the Act of 1881, " And shall not be compelled to quit the holding of which he is tenant," but no words of like import are used in section 3 sub-section (1) of the Act of 1896.

It is said that the "conditions" other than statutory conditions mentioned in section 3 sub-section 1 of the Act of 1896 must include fixity of tenure : but as pointed out by Lord Justice Andrews, there is a possible subject matter for this word "conditions" where a fair rent has been fixed on leasehold premises under section 1 of the Land Law (Ireland) Act, 1887.

I have carefully considered the argument of Mr. Leech in which he pressed us to draw a distinction between "conditions" and "incidents" and in which we were urged to look at the marginal note to section 5 of the Act of 1881 and to hold that incidents were equivalent to fixity of rent and fixity of tenure, and that the "incident" of fixity of tenure was not safeguarded by section 3 sub-section (1) of the Act of 1896, but I have not taken into account the marginal note to section 5, and its contents have in no way influenced the conclusion at which I have arrived.

Call fixity of tenure or security from ejectment by any name, whether "incident", "ingredient" or "element" of the tenancy, it is not in my opinion a condition of the tenancy, and is not secured to the tenant after the expiration of a statutory term, and whilst another statutory term is still uncreated.

Mr. Murphy very properly pressed upon us the argument that, to use his own language, section 3 of the Act of 1896 plus the case of *Callwells* v. *Reilly* (1) is good enough for the defendant. He referred us particularly to the observation of Holmes L.J. reported at the top of page 130, to the last paragraph of p. 132 and the bottom of p. 133 in the judgment of Cherry, L.J. These observations are favourable to Mr. Murphy's contention, but the ground of the decision in that case did not necessarily involve a negative answer to the question put to us,

(1) [1910] 1 I.R. p 121

and if it did not necessarily involve such an answer the case cannot be relied on as an authority for Mr. Murphy's contention.

In my opinion the question put to us should be answered in the affirmative, and plaintiffs are thus entitled to succeed in their ejectment.

Solicitors for the plaintiffs: *Crookshank, Leech, and Davies.*

Solicitor for the defendant: *Samuel A. Wray.*

J. McC.

C.A.
1926
JUNE 12, 24

## REX v. COYLE (1).

[COURT OF APPEAL.]

*Criminal law—Evidence—Children of tender years—Corroboration—Indecent Assault—Particulars of complaint made by prosecutrix—Admissibility—Nature of corroboration required—Children Act 1908 (8 Edw. 7 Ch. 67) Section 30 (a)—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5 Ch. 58) Section 28 (2).*

The prisoner was indicted for an indecent assault on a girl under the age of thirteen years. At the trial, there was admitted (a) the unsworn testimony of the child alleged to have been assaulted and of two other children of tender years, (b) the evidence of the mother of the girl alleged to have been assaulted. The mother stated that she had asked the child where she had been and what she was crying about. The child's reply was a complaint of the prisoner's conduct to her.

The trial took place before Andrews L.J., who allowed the case to go to the jury, who returned a verdict of " guilty."

*Held* by the Court of Appeal (Moore C.J., Best L.J., Wilson and Brown (J.J.) that the unsworn testimony of a child of tender years admitted by virtue of section 30 of the Children Act, 1908, could not be corroborated within the meaning of proviso (a) to that section, by the unsworn testimony, similarly admitted, of any number of such children; and *held* also that assuming the answers of the girl to her mother's questions to have been properly admitted, they were not evidence of the facts complained of, and could not constitute corroboration of these facts within the meaning of section 30 of the Children Act, 1908.

CASE STATED (2) for the opinion of His Majesty's Court of Appeal—Northern Ireland by Andrews L.J., at the City of Londonderry Spring Assizes, 1926.

The facts set out in the case stated, so far as material, are quoted in the judgment of Best L.J. The question for the Court was whether the testimony of the child alleged to have been indecently assaulted was corroborated by some material evidence in support of the prosecution implicating the accused within proviso (2) to section 30 of the Children Act, 1908.

*MacDermott* for the prisoner :—

(1) In the Court of Appeal before Moore, C.J., Best, L.J., and Wilson and Brown, JJ.

(2) See 13 Geo. 5 (Sec. 2) c. 2 sch. 1. 6 (2).

[Brown, J.—Does it appear what age in fact the child was? Macdermott—It appears from the indictment that the child was aged seven.]

Moore, C.J.—Suppose the evidence of M. A. K. was admissible would it amount to corroboration?

MacDermott—I submit that the evidence would not be corroboration implicating the accused, and that I was entitled to a direction.

*Maxwell, K.C.*—Once the accused was called the whole evidence was a matter for the jury.

The Court decided that the evidence of the accused should not be opened.

*MacDermott*—Section 4 of the Criminal Law Amendment Act, 1885, under which the prisoner was charged, in *Reg.* v. *Paul* (1) is identical with Section 30 of the Children Act, 1908. In *Rex* v. *Baskerville* (2) the Court laid down what evidence was necessary to constitute corroboration. The evidence of each child was clearly within Section 30 of the Children Act, 1908, which contemplated that not only the evidence of the child alleged to be injured, but that of any other children should be subject to the proviso which applies to any child of tender years whose evidence is tendered. By the Act the evidence is admissible, but requires corroboration. I have not been able to find any English or Irish case dealing with this particular point, but there is a Canadian case, *R.* v. *Whistnant* (3) where it was held under Section 1003 of the Canadian Criminal Code that the unsworn testimony of one child of tender years could not corroborate the testimony of another such child so as to satisfy the section. In another Canadian case, *R.* v. *M'Inulty* (4) to the like effect it was held that unsworn testimony, whether of one child or of several children, is not to be acted upon unless fortified by other material evidence corroborating it of a different character, i.e., evidence which is legal evidence evidence apart from this Section.

As to the complaint to the mother, my objection to it was that it was elicited by way of question and answer.

(1) 2 J.Q., B.D., 202
(2) [1916] 2 K.B. 658
(3) [1912] 22 W.L.R. 762
(4) [1914] 19 B.C.R. 109

C.A. 1926

REX v. COYLE

In *Reg* v. *Merry* (1) it was held that where a person indecently assaulted makes a complaint; not of her own initiative, but in answer to a question, the particulars of such complaint, though otherwise admissible within the rule in *Reg* v. *Lillyman* (2) cannot be given in evidence. In *Rex* v. *Osborne* (3), *Reg* v. *Merry* (1) was considered and qualified. The child's statement to her mother was, I submit, not properly in evidence. In *Rex* v. *Lillyman* (2) Hawkins, J., stated: "The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains." I rely on *Rex* v. *Christie* (4). In that case Lord Atkinson said at p. 557 referring to the direction by the presiding judge at the trial: "Again he (the presiding judge) treated the evidence of the mother of the boy and the constable as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of the 30th Section of the Children Act of 1908. This is, of course, wholly erroneous." He also referred to *R.* v. *Evans* (5).

*Maxwell, K.C.*, and *Dougherty* (with them *M'Neill*) for the prosecution:—The complaint made by the child to her mother is admissible in evidence, *Rex.* v. *Lillyman* (2), end evidence of her mother could, we submit, be used as corroboration. The fact that the child immediately after the offence told her mother all about her treatment by the prisoner is strong corroboration of the truth of her story, We rely on *Rex* v. *Camelleri* (6). There the trial judge admitted particulars of a complaint made by a boy to his parents shortly after the commission of the offence, not as evidence of the facts complained of, but to show consistency of conduct on the part of the boy and as tending to corroborate his evidence. The Court of Criminal Appeal held that the evidence was rightly admitted. We submit that the unsworn testimony of one child which is admissible under Section 30 can corroborate that of another. Hawkins, J., says in *Rex* v. *Lillyman* (2), at p. 170: "In every one of the old text books proof of com-

(1) 19 C.C.R. 442
(2) [1896] 2 Q.B. 167
(3) [1905] 1 K.B. 551
(4) [1914] A.C. 545
(5) 18 Cr. App. R. 123
(6) [1922] 2 K.B. 122

plaint is treated as a most material element in the establishment of a charge of rape or other kindred charge." Later on in his judgment in the same case the same judge, referring to the case of *Rex* v. *Brazier* (1), said at p. 173: "The admissibility of the evidence of the complaint is dependent upon proof of the facts by sworn or other legalized testimony." Corroboration does not mean independent collateral proof. Once corroborative evidence has been given, the weight to be attached to that evidence is a matter for the jury.

June 24

Best, L. J., delivered the judgment of the Court as follows:—

This matter comes before us on a Case Stated by Lord Justice Andrews from the Spring Assizes, 1926, for the County of the City of Londonderry.

At these Assizes William Coyle was tried on an indictment charging that he, the said William Coyle, on the 22nd day of January in the year of our Lord, One thousand nine hundred and twenty-six, one M. D., a girl under the age of thirteen years, to wit a girl of the age of seven years, unlawfully and indecently did assault, and she, the said M. D., did then beat, wound and ill-treat, etc., against the form of the Statute in such case made and provided, and against the Peace, etc. To this indictment prisoner pleaded "Not Guilty."

The child M. D. was not sworn, as she did not understand the nature of an oath, but in the opinion of the learned Lord Justice she was possessed of sufficient intelligence to justify the reception of her evidence, and she understood the duty of speaking the truth.

She stated that she remembered a Friday night in January being in Rossville Street. M. A. K. and M. R. were with me. I know William Coyle a good long while ago. I saw him that evening. It was dark. He was at the corner of the street. He said: "Will you's two come with me?" The other girl to whom he referred was M. A. K. She said "No." I went with him to a big house I was never in before. William Coyle knocked at the door and a woman opened it. He said: "Please, will you let me in?" Coyle went into the kitchen, and I went

(1) Leach, 199

C.A. 1926.

REX v. COYLE

with him. An old woman and an old man were in the kitchen. The woman was making tea. Coyle asked for tea, and I got tea, too. The woman went out to the street and bought me a tart. The old man and Coyle took tea, and the woman went out to the yard. Coyle said, "Come on out to the hall?" He said, "Lie down there on floor." I did so, and he got on top of me. The girl then mentioned certain acts of indecency which Coyle is alleged to have committed, and which, if legally proved, would have amply sustained the charge in this indictment.

Mr. MacDermott, Counsel for Coyle, objected to this evidence on the ground that it was not in the nature of a "complaint" within the principle of *Reg* v. *Lillyman* (1), but the evidence was admitted.

The girl further stated: I went to my home with Coyle. He left me in Thomas Street—my street. When leaving me he said: I'll bring you to a little house in a field to-morrow night; don't tell anyone what I done to you. I said I would meet him next evening. My mother was at home. I spoke to my mother. My father was there, and spoke to me. He hit me with a cane on the head, and mother caught the cane. Mother asked me where I had been. She said, "Where were you?" I said I had been with William Coyle. I told mother what had happened with Coyle and where I had been. Coyle was full drunk that night.

M.D. was cross-examined, but it is not necessary for our decision to state the substance or result of the cross-examination.

M. A. K., another child of tender years, was allowed to give unsworn testimony, and said: I am in the same class with M. D. I met her at Rossville Street and Thomas Street after five o'clock. M. R. was there too. It was dark. William Coyle, whom I identify, spoke to me at the corner. He asked me to go for a walk. I said "No." M. D. went with him. M. R. went with message to M'Keown's, and I went home. M. R. went to M. A. D. (the child's mother) to tell. I never saw a drunk person. In cross-examination she said: M. D. asked for a penny. She was asking Coyle for a penny. She was not very frightened of him, and she went away with him. I saw William Coyle coming back again.

M. R., also a child of tender years, who was allowed to give unsworn evidence, said: I remember being sent a

(1) [1896] 2 Q.B. 167

message between 5 and 6 o'clock to M'Keown's in Rossville Street. All three of us go to the same school. When in M'Keown's shop I saw M. D. at the shop window, and Coyle was there too. I identify him. They were going in the direction of William Street.

Though not admissible against the prisoner, this will explain why M.'s mother put a series of questions to M. when she returned home.

The mother of M. D. was examined on oath, and swore that she was in her house on Friday, 22nd January, and that in consequence of a message from M. R. she went to look for her daughter, but could not find her; that her husband was in the house, that M. came back later after 7 o'clock, that her face was very red, and she looked as if she had been crying. Her face was all red. My husband reached for the cane to strike her with it. He struck her once, I think across the shoulders. I snatched the cane from him. I had previously communicated with the police. When the child came back I asked her where she was and what she had been crying about. I asked her where Willie Coyle had taken her to. She told me he took her to a house, and she got tea in it and a tart; that a woman in the house gave it to her. I asked her what was wrong that she was crying, and what did Willie Coyle do on her? I asked her did he strike her, and she said "No." I said that he must have done something, and she said that he hurted her. I asked her how.

It is not necessary for the decision of the point reserved that details of the acts of indecency should be set out, suffice it to say that as described to this witness they are substantially identical with those set out in the evidence of the child herself. The child was taken by her mother to the doctor at 1 a.m. on 23rd January, who examined her. The doctor's evidence is not material on the point reserved, nor is that of the father of the girl, who was also examined.

At the close of the case for the Crown Mr. MacDermott applied for a direction on the ground that there was no proper evidence to go to the jury. He referred to the Children Act, 1908, section 30, proviso (a), as to the necessity for corroboration. He submitted that the children's evidence was not corroboration, and that if it were excluded there was no evidence left upon which the jury could find corroboration.

C.A. 1926.

REX v. COYLE

Mr. Maxwell, K.C., for the Crown, contended that the requirements of the Children Act, 1908, section 30, proviso (a), as to the necessity for corroboration of the evidence of M. D. by other material evidence were satisfied by the unsworn testimony of the other two children, M. A. K. and M. R., by the evidence of the mother as to the child's complaint, in which she named the prisoner Coyle, and by other portions of the evidence given at the trial, viz., as to the absence of the child from the house at the time the offence was alleged to have been committed, the conduct of the child's father on her return, and the search made by her mother.

The learned Lord Justice allowed the case to go to the Jury, and evidence was given for the defence by the prisoner himself and another witness. The Jury returned a verdict of "Guilty," and the prisoner was bound over on bail with suitable sureties to appear at the next July Assizes to receive sentence of Six Calendar Months imprisonment with hard labour, which was recorded against him in the Crown Book, to come into force if this Court were of opinion that there was corroboration within the section of the evidence of M. D.

The question for the Court is:—

> Whether the testimony of the child M. D. was corroborated by some other material evidence in support of the prosecution implicating the accused within proviso (a) to section 30 of the Children Act, 1908?

Mr. MacDermott for the prisoner referred to that section. The parts of it relevant to this case are that "Where, in any proceedings against any person for any of the offences mentioned in the First Schedule to this Act, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Provided that (a) A person shall not be liable to be convicted of the

offence unless the testimony admitted by virtue of this Section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

By the Criminal Justice Administration Act, 1914, sec. 28 (2), the provisions of section 30 of the Children Act, 1908, were applied to proceedings against persons for offences not mentioned in that section, in like manner as they applied in respect of proceedings for offences mentioned in that Section, and the reference to the First Schedule of the Act of 1908 becomes immaterial.

Mr. MacDermott cited the case of *Rex* v. *Baskerville* (1), in which the question at issue was the nature of the corroboration required by the Common Law where, on the trial of an accused person, evidence is given against him by an accomplice; and he submitted that the corroboration contemplated in the proviso to section 30 is substantially of the same character as that referred to in the case cited. He submitted that there was no corroboration of the testimony of M. D., either by the unsworn testimony of M. A. K. or M. R., or of both, or by the evidence on oath of the mother of M. D.

What is to be corroborated in a case of this kind? The proviso to section 30 says that it is the testimony admitted by virtue of this section and given on behalf of the prosecution, which must be so corroborated. The evidence of each of the children, M. A. K. and M. R., was admitted by virtue of the section, and could not have been admitted apart from its provisions, and the plain meaning of the proviso is that that which is corroboration must be something different in kind from testimony admitted by virtue of the section.

We are of opinion, therefore, and so hold, that the unsworn testimony of a child of tender years, admitted by virtue of this section, cannot be corroborated within the meaning of the proviso by the unsworn testimony, similarly admitted, of any number of such children.

Mr. MacDermott submitted that by reason of the questions put to M. D. by her mother, and on account of their number and nature, the statements made in answer to these questions do not constitute a complaint, and were,

(1) [1916] 2 K.B., 658

C.A. 1926.

REX v. COYLE

therefore, wrongly admitted as evidence; and in support of his argument he cited a passage from *Rex* v. *Osborne* (1). In that case the prisoner was indicted for indecent assault on a girl under the age of thirteen years, whose consent was therefore immaterial, and at the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the prisoner, as to why the girl had not waited for the other child at the prisoner's house. The girl's reply was a complaint of the prisoner's conduct to her.

The passage in question will be found at the bottom of p. 555 of the report, where Ridley J., delivering the Judgment of the Court, says: In that case, i.e., the case of *Reg* v. *Merry* (2), "a question had been put to a girl of nine years old by her mother in a case of indecent assault, and the learned Judge ruled that, as the proposed evidence was a statement made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl," and the learned Judge goes on to discuss the questions which might render statements made in answer thereto inadmissible in evidence.

In the view taken by the Court of this case it is unnecessary to decide whether the answers to her mother, given by M. D., are admissible in evidence as a complaint for even, if rightly admitted, they are not corroboration within the meaning of the proviso. In this connexion reference may be made to the case of *Rex* v. *Christie* (3), and, in particular, to a passage in the Judgment of Lord Atkinson. At p. 557 he says: "Again, he treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of the 30th section of the Children Act of 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or on cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the

(1) [1905] 1 K.B., 551
(2) 19 Cox C.C., 442
(3) [1914] A.C. 545

charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more ' material corroborative evidence in support of his evidence at the trial implicating the accused ' than his would be.''

The ground on which a complaint made recently after an alleged occurrence of a sexual offence upon a woman or girl may be given in evidence, is well settled by the cases of *Reg* v. *Lillyman* (1) and *Rex* v. *Osborne* (2). *Reg* v. *Lillyman* (1) ,decides that such evidence may be given to the Jury, not as evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part. *Rex* v. *Osborne* (2), decides that such evidence is admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl, and as evidence of the consistency of her conduct. It will be observed that the complaint is not evidence of the truth of the charge alleged.

Assuming then that the answers of the child to her mother's questions were properly admitted, they are not evidence of the facts complained of, and, consequently, cannot corroborate those facts.

The question put to the Court by the learned Lord Justice must be answered in the negative, and, accordingly, the conviction must be quashed.

Solicitor for the Crown: *Assistant Chief Crown Solicitor.*

Solicitor for the prisoner: *Andrew Robb.*

J. McC.

(1) [1896] 2 Q.B., 167 (2) [1905] 1 K.B., 551

C. A. 1926

May 10, 11, 14

[IN THE COURT OF APPEAL.]

# CRAIG

v.

# THE ATTORNEY-GENERAL AND OTHERS (1).

(1922, No. 36).

*Receiver—Unauthorized payments by—Claims for contribution to payments made to redeem a mesne interest from persons deriving thereunder—Duty and responsibility of Solicitor having carriage—Receivers accounts—nonconclusiveness of*

Certain property was granted by a fee farm grant of 1891 to D. M. Prior to 1898 D. M. made various sub-grants. In 1898 a further grant of adjoining property was made to D. M., who charged the head rent reserved by the later grant on the premises comprised in the earlier grant. D. M. from time to time created various sub-interests in the premises held under his second grant, among others one to J. C., who was the plaintiffs' testator. The sub-rents arising out of the first rent were more than sufficient to pay that head rent, but the lands held under the second grant were always insolvent. In 1908, the head rent under the later grant having fallen into arrear, the head landlord obtained judgment for possession. J. C., to prevent the lands being evicted, paid the head rent due, and brought an action against D. M. and others claiming contribution in respect of the payment he had made. J. C. obtained judgment against D. M. and all the sub-grantees whose interests were created after the 22nd August, 1898, the date on which second grant was registered; it being held that the charge of the rent did not affect any interest arising under the first grant created prior to registration of the second grant.

The head rent of the grant of 1898 again fell into arrears, and J. C. again redeemed and brought a second and a third action for contribution from the same persons against whom he had got judgment in the previous action.

In 1915 a Receiver was appointed on the motion of J. C., over the interests in the lands of the defendants in the three actions. The Receiver, at the instance of J. C.'s solicitor, kept only one account for the two estates: he also spent large sums on repairs without sanction of the Court and paid the head rent reserved by the grant of 1898 first out of monies received from the lands held under the grant of 1891. J. C. and some of the defendants in the actions were represented before the Receiver Examiner at the passing of the Receiver's accounts and did not at any time raise any objection.

As a result of the Receiver's mismanagement the head rent of the lands held under the grant of 1891 fell into arrears, and after action brought, the head landlord was put into possession by a writ of habere, J. C. redeemed, having, as he claimed, acquired an interest in these lands by his judgments obtained in the prior actions. J. C. then brought the

(1) In the Court of Appeal before Moore, C J., and Brown, J.

present action against all persons interested in the lands held under both grants, seeking a declaration that the rent so paid by him was a good salvage payment, that it was well charged upon the lands held under the grant of 1891, and that the defendants were liable to contribute proportionably to the salvage payment. He also sought to make the defendants personally liable, an order for sale of their interests in default of payment, and that the Receiver should be extended to the present claim.

J. C. died before the trial of the action, which was continued by A. C. and J. H. C., his executors, the present plaintiffs.

The Attorney-General was sued as representing the heir-at-law of D. M., who died in 1916.

Wilson J. dismissed the action and the plaintiffs appealed.

*Held* by the Court of Appeal (Moore C.J. and Brown J.) that the appeal should be dismissed with costs on the ground (a) that the eviction arose from the unauthorized payments made by the Receiver; (b) that the Solicitor for J. C. having carriage of the suit must be taken to have had full knowledge and notice of all the irregularities that were being committeed from which in the discharge of his duty to the Court, he should have protected the estate; and (c) that consequently the present plaintiffs, the representatives of J. C., could not claim recoupment of money paid by them in an emergency created by their own default.

*Held* further applying *Browne's Estate* (19 LR Ir. 185) that the passing of accounts in the receiver office was mere vouching, and that such accounts might be re-opened.

APPEAL from a judgment of Mr. Justice Wilson dismissing an action in which the plaintiffs sought: (a) a declaration that the sum of £225 17s 5d paid by James Craig, deceased, their testator, on the 18th day of April, 1918, to Matilda M'Lean for arrears of rent and costs payable in respect of part of the lands of Oldpark, in the County of the City of Belfast, held under an indenture of fee-farm grant dated the 12th day of November, 1891, was a salvage payment; (b) a declaration that the said sum of £225 17s 5d with interest thereon at the rate of 4 per cent. per annum from the 18th day of April, 1918, is well charged upon the said lands; (c) an inquiry as to the respective interests and their value of the defendants in the said lands; (d) a declaration that the defendants are liable to contribute to the said salvage payment in proportion to the value of their respective interests in the said lands and an inquiry as to the amounts of the said respective contributions; (e) payment by the defendants respectively of their respective contributions and a sale of the interests in the said lands of such defendants as shall

C.A. 1926.

CRAIG v. ATTORNEY GENERAL

make default in such payments; (f) that a receiver appointed over some of the interests in the lands should be extended to the claims of the plaintiffs in the present action; (g) and such further and other relief as might be necessary.

The present plaintiffs were the executors of James Craig, who died before the trial of the action.

The following statement of facts is taken from the judgment of Mr. Justice Wilson in the Court below:—

James Craig was a sub-grantee of David Morrow of portion of the lands contained in another fee-farm grant of lands adjoining those granted by the fee farm grant of 13th November, 1891. This fee farm grant was dated the 22nd August, 1898, and was made by the trustees and executors of John Browne, deceased, to David Morrow at the rent of £89 9s 4d, and this fee farm grant contained a charge by the grantee, David Morrow, on his estate and interest under the fee farm grant of the 13th November, 1891, of the £89 9s 4d rent reserved by the fee farm grant of 22nd August, 1898. The fee farm grant of 13th November, 1891, was of 9 acres and 9 perches, and was developed sufficiently to produce a gross rental of upwards of £500 per annum for David Morrow and his assigns. The fee farm grant of 22nd August, 1898, was only partly developed and only produced a gross annual rental of less than £60. In the result and pending further development of the lands in the fee farm grant of 22nd August, 1898, these lands did not produce sufficient rents and profits to pay the head rent of £89 9s 4d, and the consequence was that the head rent was not paid, and Matilda M'Lean, in whom the grantor's interest in both grants was then vested, obtained on the 29th June, 1908, judgment for possession of the lands in the 1898 grant against David Morrow and his sub-tenants, including James Craig, and he, to prevent these lands being evicted, paid a sum of £144 10s 2d for the rent due and costs. The plaintiff's only estate in the lands is in part of the lands comprised in the grant of 22nd August, 1898.

James Craig then brought an action (1909, No. 59) against David Morrow and several other defendants, similar to the present, claiming contributions from David Morrow and his grantees and tenants both of the lands

granted by the 1898 grant and the lands in the 1891 grant, which were subject to the charge for the rent of the 1898 grant created by David Morrow. It was held in that action that this charge only affected the interests of David Morrow in the 1891 grant which were left in him at the date of the registration of the grant of 22nd August, 1898, viz , on the 23rd September, 1898. Some of the defendants in the present action were not defendants in that action, and are not bound by the proceedings therein. Some of the defendants in that action obtained judgment with costs against the plaintiff, as their interests had been acquired before the charge created by the 1898 grant was registered, but on the 10th March, 1910, judgment was obtained against David Morrow and Eliza F. Crawford as against all their interests in the lands comprised in the fee farm grants of 13th November, 1891, and 22nd August, 1898, against Annie S. M'Kee and Edward O'Rorke Dickey on their interests in the lands comprised in a sub-fee farm grant of 19th September, 1898, against J. B. Wallace, James Wallace, junior, and William B. Wallace on their interests in the lands comprised in the sub-fee farm grants of 3rd November, 1898, and 3rd December, 1900, against Anna M. Brady on her interests in the lands comprised in a mortgage of 1st January, 1902, and against Eliza M. Kennedy on her interests in the lands comprised in a mortgage of 23rd May, 1902.

The head rent of the 1898 grant again went into arrear, and James Craig again paid a sum of £260 16s 6d to the head landlord to save the lands in that grant from eviction and then brought another suit for contribution against the defendants against whom he had got judgment in the former action.

By an order of the Court of Chancery in Dublin, made on the 29th October, 1912, in both actions (1909, No. 59 and 1912, No. 127) by consent the judgment in the first action was extended to this second action and similar relief was given in respect of the sum of £260 16s 6d with interest at 4 per cent. from 3rd February, 1912.

The rent reserved by the 1898 grant again fell into arrear, and James Craig paid a further sum of £262 16s 6d to the landlord for rent and costs to save eviction, and brought a third action claiming this as a salvage payment and contributions from the same defendants and a sale of

C. A. 1926

CRAIG v. ATTORNEY GENERAL

their interests in default of payment, and it was referred to Chambers to ascertain their proper proportions. Judgment as asked was given on 26th May, 1916 (1915, No. 79), but the proceedings at Chambers were never prosecuted.

There were several orders and inquiries in Chambers in the first two actions as to the proper contributions of James Craig and the defendants therein and their respective titles to their interests; and finally by an order of 20th July, 1915, it was, on James Craig's motion, referred to the receiver judge to appoint a receiver over the defendants' interests in the lands in the 1891 grant, which were set out in detail as Nos. 2 to 11 in the schedule to the notice of motion of 15th July, 1915, and it was further ordered that Nos. 2 to 7 in that schedule be sold under the direction of the judge. In October, 1915, on James Craig's motion, the receiver judge appointed Mr. M'Auley receiver over the interests of the defendants in those actions in inter alia the lands comprised in the 1891 grant.

Mr M'Auley said in his evidence that any instructions he got were from James Craig's solicitor, Mr. William Alexander; that no solicitor was appointed for him till about twelve months after he began his duties to 1st November, 1915; that William Alexander handed him a map of the two plots of grounds comprising the lands in the 1891 grant and the 1898 grant, and the copy of the order appointing him receiver; any information he got about the property for the first twelve months was from William Alexander. The maps shewed that the 1891 grant was fairly well developed, and that the 1898 was not. He knew there was going to be a debit balance on the estate, and he told William Alexander they would never pay. William Alexander never told him to keep separate accounts of the rents and outgoings of the two grants. There was only one headlandlord, and he (the receiver) was either told or left under the impression he was to treat both as one estate, and his recollection was that he was told by William Alexander to treat it all as one account. When he was appointed receiver there were no arrears of rent due out of the 1891 grant, but on 1st November, 1915, a half year's rent became due. The accounts shew that ample rent to discharge the head rent

of the 1891 grant was received by him out of the 1891 grant if that rent had been treated as the first outgoing. He pointed out to William Alexander that the estate would never pay, and what really made the estate bankrupt was the 1898 grant. He knew the rent should be paid first. On the 5th November, 1917, one and a half years' rent of the 1891 grant was in arrears. He knew he paid £100 6s 6d for repairs in 1916. There were a number of Corporation sanitary orders out against the houses. He would not have spent these moneys on repairs without talking to William Alexander, who did not object. He continued: "There was £78 18s 10 for repairs in my second account in 1917. The rent of the 1898 grant was paid out of moneys received from the 1891 grant, and the rent of this latter grant was let go into arrear. There was not enough for both. This is apparent from my accounts. William Alexander's brother, Thomas Erskine Alexander, was appointed solicitor for me as receiver when I was passing my first account. One reason why I may have paid the rent of the 1898 grant was I may have been pressed for that payment and had the smaller amount in hand. William Alexander was represented before the receiver examiner on the passing of my accounts, and was paid by me for so attending, and this was allowed me as part of my costs as receiver on passing my accounts. The defendants, or some of them, were similarly represented and paid. No objection was made to my accounts, and no objection was taken to the head rents not being paid or to the head rent of the 1898 grant being paid out of the profits of the 1891 grant in priority to the head rent of the 1891 grant."

William Alexander, who had previously given evidence, was recalled after this evidence and did not contradict any of it.

In consequence of this course of management the head rent of the 1891 grant fell into arrear, and on the 15th November, 1917, the head landlord obtained a judgment for possession of the lands. A Writ of Habere was executed by the Sheriff on the 19th December, 1917, and the head landlord was put into possession. On the 18th April, 1918, James Craig redeemed by paying the sum of £225 17s 5d for rent and costs, and he, on the 30th May,

C.A. 1926

CRAIG v. ATTORNEY GENERAL

1918, issued the writ in the present action against all persons in the lands held under both grants.

Wilson J. dismissed the action.

*M'Gonigal K.C.* and *Murphy K.C.* (*Robb K.C.* and *W. Lowry* with them) for the plaintiffs :—

Any person having an interest in property which is being evicted for non-payment of head rent can redeem and bring a salvage claim against all interests in the property. We submit that the plaintiffs had by the former actions got an interest in the lands held under the 1891 grant. Those lands have been saved from eviction, and the tenants are liable to contribute in proportion to their interests therein. It was agreed in the court below, and Mr. Justice Wilson so held, that the plaintiffs could not succeed in their action because the receiver who was appointed at their testator's instance acted wrongly (1) in expending too much on repairs without the sanction of the court, and (2) in paying the rent reserved by the 1898 grant in priority to that reserved by the 1891 grant out of rents and profits received from the lands held under the 1891 grant.

As to the repairs: a receiver can spend any sum he likes at his own risk, though it is always proper to take the opinion of the court: Kerr on Receivers, p. 260, and *In re Graham* (1). In this case the receiver took the risk because he was served with notices from the Corporation authorities. At the passing of the receiver's accounts no objection was made to the items in question nor were the costs disallowed. All the defendants held liable to contribute in the previous actions were served with notice to attend at the passing of the accounts, and some of them did so. A receiver is an officer of the court, and is not an agent for anyone: Kerr on Receivers, p. 285.

As to the rents: there is no priority between the two rents; the order appointing the receiver did not direct that separate accounts for the two properties should be kept and rightly so. So far as the defendants affected by the previous actions are concerned, both rents were on the same footing, and it was wholly immaterial which rent was paid first. Two solicitors for defendants were present

(1) [1895] 1 Ch. 66.

when the order appointing the receiver was made, and no objection was raised to his appointment, nor was any request made by them that special directions should be given to him .

It has also been objected that this is not a good salvage payment. In *re Powers Policies* (1) the elements that go to make a good salvage payment are laid down, and we submit that all the elements are present here.

Mr. Justice Wilson would have dismissed the action, even if it were a good salvage payment, because relief was claimed against the defendants personally. But this claim for personal relief only goes to the form of the order sought: in *Alison* v. *Jenkins* (2) the order made was in these terms. This claim for personal relief is obviously ancillary to the other relief claimed. Where an advance has been made to redeem, it can be recovered in a personal action against the person or persons primarily liable.

There is no evidence to support the innuendo that the occasion for this salvage payment was engineered by James Craig. What onus lay on him or his solicitor to prevent this head rent going into arrear? This was a bona fide salvage payment of the arrears of the head rent of 1891 to save all the interests arising under that grant, and it should be treated as a meritorious payment. It would be extremely curious if the payment were to be defeated because the receiver has made a mistake which was not present to the mind of anyone when the accounts were presented and passed.

[The following cases were also cited in argument: *Lombard* v. *Kennedy* (3), *O'Geran v. M'Swiney* (4), *Lock* v. *Evans* (5) *Murphy* v. *Davey* (6), *Ryan* v. *Byrne* (7).]

*Leech K.C.* (with him *Warnock*) for the defendants, Eliza Ferguson Kennedy and Emily Dickey.

The plaintiffs' claim is an equitable one, and he who seeks equity must do equity. The two head rents are not

(1) [1894] 1 Ir. Rep. 6.
(2) [1904] 1 Ir. Rep. 341.
(3) 21 L.R. Ir. 501.
(4) Ir. Rep. 8 Eq. 500.
(5) 11 Ir. Eq Rep. 54.
(6) 14 L. Rep. Ir. 28.
(7) 17 Ir. L.T.R. 102.

C.A. 1925.

CRAIG v. ATTORNEY GENERAL

on the same basis of priority. That of the grant of 1898 is puisne in every way to that of the grant of 1891. The land held under the grant of 1891 is only a security for the rent of the land held under the grant of 1898, and is only liable in so far as the rents arising from that grant are insufficient to pay its head rent.

It was the duty of the receiver to keep separate accounts and to deal separately with the two lands; the land held under the earlier grant was quite solvent in itself. It was the duty of James Craig and of the solicitor having carriage, who in this case was Craig's solicitor, representing as he did all parties beneficially interested, to protect all interests. This was not done here. The solicitor having carriage must see that the receiver acts properly: see Madden's Land Judges, p. 121, rule 17; *In re Gage's Estate* (1) and *In re St. George's Estate* (2). The court always looks for information to the solicitor having carriage. William Alexander admitted in evidence full knowledge that the head rent reserved by the grant of 1891 was going into arrears, that it was a first charge, and that if separate accounts were kept those lands would be solvent. He took complete charge of the receiver, and is responsible for every wrongful act done. It was at his instigation that an excessive amount was spent on repairs. A receiver cannot spend more than £30 on repairs without the leave of the court. The result of this large payment for repairs was that the head rent fell into arrear, so leaving the lands open to eviction, and thus giving the head landlord the benefit of those repairs.

In the statement of claim there is a claim for personal relief against the defendants. Such a claim is quite wrong. This is a salvage claim and is available only against the premises salvaged: *In re Power's Policies* (3), at p. 27, *The Annie* (4) and *The Schiller* (5).

*Megaw K.C.* (with him *Porter*) for the defendants, John Workman, Robert M'Bride, James G. Crawford, David Irwin, James Wilson, Robert Wallace, Thomas Boyd, John M. M'Ilrath, Alexander Gallagher and Campbell M.

(1) 17 L.R. Ir. 111 at p. 117.
(2) 19 L.R. Ir. 566.
(3) [1894] 1 Ir. Rep. 6.
(4) 12 P.D. 50.
(5) 2 P.D. 49.

Young, Trustees of the Society of Contributions of the Funds for the Widows and Orphans of Presbyterian Ministers distinguished by the name of Seceders, and for the defendant Elizabeth Garner.

These defendants were not parties to the previous actions and have no knowledge of the receiver's accounts and transactions, and are thus unembarrassed in their defences. They all hold under the grant of 1891, and their interests were created prior to 1898, that is, before the head rent of the grant of that year was charged on the lands held under the grant of 1891.

The conduct of James Craig was inequitable, because it had or claimed to have had, laid the burden of contribution on person not liable for the head rent of the grant of 1898.

When the receiver presented his accounts in 1917, he knew that judgment had been marked against the lands held under the grant of 1891, but did not bring the fact to the notice of the court. William Alexander took complete control of the receiver, and is fixed with responsibility for his acts, and the plaintiffs cannot gain an advantage through their solicitor's default.

*William Beattie K.C.* (with him *Ellison*) for the defendants, Annie Shaw M'Kee, Elizabeth Margaret Crawford, John R. M'Kee, Albert J. Lewis, William G. Martin, Richard Lewis and Edward Tilly.

The court ruled it was not necessary that counsel for these defendants should be heard as their interests did not differ from those of other defendants.

*J. C. Davison* for the Attorney-General, representing the heir-at-law of David Morrow, deceased.

*B. Maginess* for the defendant R. C. Bannister, representative of Anna M. Brady, deceased.

*M'Gonigal K.C.* in reply.

The receiver is not anybody's agent, but is an officer of the court appointing him. If there is any mistake in the receiver's accounts or conduct he is personally liable to an action by any person damnified thereby. If the conduct of William Alexander was wrong, his clients are not

C.A. 1926.

CRAIG v. ATTORNEY GENERAL

responsible. The whole duty to draw the attention of the court to matters affecting the lands is thrown on solicitors and not on the parties themselves : *In re Gage's Estate* (1). It is not the client but the solicitor who is made liable for neglect or default. It is wrong to speak of William Alexander as " the solicitor having carriage " ; this is not a mortgage or an administration suit. Mr. Alexander was and is simply solicitor for the plaintiff.

The defendants may have a remedy against other parties, but they cannot escape from their liability to contribute to this salvage claim. The receiver and not William Alexander should have brought the eviction to the notice of the examiner and the receiver judge.

MOORE C.J. delivered the judgment of the court as follows :

After considerable discussion the questions argued before us have resolved themselves finally into one. The claim in the writ of summons for £225 17s 5d paid by the plaintiffs' testator on the 18th April, 1918, to redeem a mesne interest under or through which all the defendants are severally interested in varying degrees, being prima facie a salvage claim, are the plaintiffs by reason of the facts proved disentitled to succeed in this action? The learned judge in the court below has held that they were so disentitled, and this appeal by them has come before us accordingly.

Mr. Justice Wilson has dealt very carefully with the evidence, and there is so little of it in dispute that we propose to take up the narrative as it stood on 29th October, 1915. At that date the plaintiff, James Craig, a subgrantee on part of the M'Lean estate, had already on two separate occasion redeemed the estate from eviction by the head landlord on payment of the arrears of rent and costs, and in turn, after litigation, had obtained judgment for the several amounts so claimed as salvage claims with costs, amounting together to £144 10s 2d and £260 16s 6d, with interest thereon at four per cent., neither of which sums except for a small proportion of costs has ever been paid.

(1) 17 L.R. Ir. 111.

Upon the application of the plaintiff an order was made in these suits by the Master of the Rolls, dated 22nd June, 1915, referring the matter to the receiver judge to appoint a receiver. The receiver, Mr. M'Auley, was appointed on 29th October, 1915, and went into possession on the 1st November. He was then in the position that his first duty was to discharge the head rents of the lands comprised in lot 1. The head rent, as adjusted, was £218 13s 6d, and there was an income of approximately £400—£500 per annum from lot 1. He had also to pay the head rent of the lands comprised in lot 2; this rent as adjusted was a rent of £86 8s 10d, but the income of this lot only amounted, pending development, to £35—£50 per annum. The balance was secured by a charge on the lands in lot 1, but this charge could only come in its proper priority as dating from its creation in the indenture of 22nd August, 1898.

We agree with the findings on the evidence of Mr. Justice Wilson that the plaintiff in the action, through his solicitor, Mr. William Alexander, was party and privy to all that followed in the suit. Mr. Alexander was consulted by the receiver and frequently advised him, and there is no doubt that the course adopted by the receiver was freely authorised by him so far as he can be said to have any authority.

As we have said, the first duty of the receiver was to preserve the estate over which he was in possession under order of the court, and this involved payment in each year of the head rent. When the receiver was appointed a half year's rent became due on the 1st November, 1915, and in the course of the following twelve months he paid this sum, and no more, as appears from his accounts. In respect of lot 2 he paid £130 8s 3d during the same period, bringing that rent up to the 1st May, 1916. In addition to this he spent £100 16s 10d on repairs, and we have no doubt that this expenditure was all authorised or advised with the full sanction of Mr. Alexander, who, being the solicitor for the plaintiff in the suit, was the solicitor having carriage.

At the end of the year 1915-16 the receiver was one year's rent in arrear in respect of lot 1 and had a balance of £6 14s 11d in hands. During this year he received in

C.A. 1926.

CRAIG v. ATTORNEY GENERAL

respect of lot 1 £447 8s 3d, and in respect of lot 2 £64 1s 2d.

In the following year, 1916-17, he received in respect of lot 1 £434 12s 4d, out of which he paid £92 18s 9d, a half year's rent up to the 1st May, 1916. In respect of lot 2 he received £44 3s 4d and paid £86 18s 10d, being one year's rent up to date. During this period he also spent in repairs £78 18s 10d, and at the end of the year had a balance in hand of £25 3s 6d.

On the 21st September, 1917, the reversioner, Mrs. Matilda M'Lean, issued an ejectment in payment of one year's rent in respect of lot 1 up to the 1st May, 1917, amounting to £218 13s 6d, and judgment was entered accordingly. The said judgment was executed by Writ of Habere.

On the 18th April, 1918, the plaintiff, James Craig, again redeemed this rent by payment of a sum of £225 17s 5d and costs, which is the amount now sued for in this action, and subsequently issued on the 30th May, 1918, a new writ, claiming contribution from the defendants as due to him for this sum as a salvage payment.

The defendants, with the exception of John Brown Wallace, James Wallace, junior, and William Brown Wallace, have been represented at the hearing before us. Speaking generally, their contention is that the conduct of the plaintiff, in so far as it encouraged or brought about payments by the receiver, was irregular and contributed to the insolvency of lot 1, disentitling the present plaintiffs to claim the amount in equity as a salvage claim. They allege that the dangers from which plaintiff's testator claims to have rescued the estate were in reality brought about by the course of conduct adopted by himself and his solicitor, Mr. Alexander; and we are of opinion that if such be established, this contention succeeds.

It was the first duty of the receiver appointed by the Receiver Judge to preserve the estate over which he had been appointed in the Court of the Land Judge. Under the receiver office practice generally, while orders were drawn up directing receivers what they should pay in respect of charges in proper priorities on an estate over which they were appointed, no special direction was ever given for payment of the head rent, rates, taxes, &c., as it was assumed to be part of the receiver's ordinary duty

to pay them without leave. In the present case the receiver acted in an entirely unlawful manner in the accounts for 1915-16 in paying out £100 16s 10d for repairs on the property while the head rent was in arrear, without having brought the matter for directions before the court. Just as it is the duty of the receiver to hold possession and collect the rents and profits for the court of the estate over which he has been appointed, so it is equally the duty of the party having carriage, especially where at his instance the court has gone into possession by its receiver, to protect the court in the administration of the moneys so collected by the receiver, and to bring him before the court for misfeasance, neglect, misappropriation, or delay, and in all cases of difficulty for directions.

See *Harrison's Est.* (1), where Monroe, J.—following *Batten* v. *Wedgewood Coal & Iron Company* (2)—says: "There is no doubt but that the solicitor having carriage has a duty to perform, not merely to his own client but to all persons interested in the property for sale, whether owner or incumbrancer, and also to the court, in seeing that everything in connection with the sale, the fund realized, and the distribution of that fund is properly done."

These principles equally apply where the solicitor has not proceeded to a sale, but has obtained a receiver to collect the income of the estate. It was the duty of plaintiff's solicitor, as solicitor having carriage in the suit, to bring this expenditure to the notice of the Master of the Rolls, just as at a later stage it was equally his duty to bring to the knowledge of the court the fact that the estate over which the court had appointed a receiver had been evicted for non-payment of a year's rent. Yet this was never done. Apparently, on the advice of Mr. Alexander, once the receiver had allowed this liability to accumulate, with these consequences, he advised his client to provide the money for redemption without the court being consulted at all.

There was further a rule in the Land Judges' Court—Order III., rule 1—which applies to receivers in that branch of the Chancery Division, to the effect that receivers appointed by the receiver judge over estates are not authorised to spend a sum exceeding £30 in the

(1) [1895] 1 Ir Rep. 259. (2) 31 Ch. Div. 346.

C.A. 1926.

CRAIG v. ATTORNEY GENERAL

year for repairs to the premises for which they are appointed without the leave of the court, and this would appear to be also the practice in England from the passage in Kerr on Receivers, to which Mr. Leech referred. This was equally ignored in the present case at the instance of of plaintiffs' solicitor.

At first sight one might have thought that the receiver would have been kept right in his payments by his own solicitor, but he does not appear to have consulted him at all, and indeed had he done so, it might not have altered the position materially as he proves to have been Mr. Alexander's brother, nominated to the receiver by Mr. Alexander himself.

Mr. M'Gonigal has pressed strongly upon us the fact that the receiver's yearly accounts in the successive years were passed by the examiner and allowed by the receiver judge, and says they are now conclusive first of the knowledge and concurrence of all parties in the irregularities, and, as we understand him, equivalent to sanction by the judge. This is not the case; such passing of accounts in the receiver office was mere vouching. Monroe, J., in *Browne's Estate* (1) (affirmed by C. A.), shows their character, and claims the right to reopen them at any time, declaring that they are not conclusive and that the order allowing them is not an appealable order.

We are of opinion that the learned judge was wholly right in finding that this eviction arose from the wrongful payments made by the receiver, for which Mr. Alexander was equally responsible; that Mr. Alexander, as solicitor for the plaintiffs having carriage of the suit, must be taken to have had full knowledge and notice of all the irregularities that were being committed, from which, in discharge of his duty to the court, he should have protected the estate, and that in consequence plaintiffs, the representatives of James Craig, cannot now be heard to claim recoupment of monies paid by them in an emergency created by the default of themselves, certainly with the knowledge of the testator and his adviser.

It is urged upon us as a great hardship on the plaintiffs that their testator paid the sum sued for in this action, and that the defendants having got the benefit of it, they should not now be repaid.

(1) 19 L R. Ir. 185 at p. 188.

The obvious answer to this is, that it would never have become necessary for the plaintiffs' testator to have paid this money at all had he not concurred with his solicitor in devoting other moneys, which should have stood between the defendants and the burden of the head rent, to objects which may not have benefitted the defendants at all, and which moneys were so spent without their knowledge and without the sanction of the court.

We therefore affirm the judgment of Wilson, J., with costs of this appeal.

Solicitor for the plaintiffs: *William Alexander.*

Solicitor for the Attorney-General: *J. P. Best.*

Solicitors for the defendants: Eliza Ferguson Kennedy and Emily Dickey: *Cunningham & Dickey.*

Solicitor for the defendants: Annie Shaw M'Kee, Elizabeth Margaret Crawford, John R. M'Kee, Albert J. Lewis, William G. Martin, Richard Lewis and Edward Tilly: *A. J. Lewis.*

Solicitors for the defendant Presbyterian Trustees: *Moorhead & Wood.*

Solicitors for the defendant Elizabeth Garner: *Peden & Reid.*

Solicitor for the defendant R. C. Bannister, representative of Anna M. Brady: *R. C. Bannister.*

A. A. C.

CH. DIV. 1926.

JAN. 21, 22
FEB. 2

## GINGLES AND OTHERS v. MAGILL. (1925. No. 58.)

*Tenancy in common—Alleged excessive user by one co-tenant—Injunction not granted in absence of proof of actual damage Nor account under 6 Anne (Ir.), c. 10, s. 23—Usual order for partition and sale.*

Certain mountain lands were let to tenants on yearly tenancies in twenty-two undivided shares for grazing purposes. The right of the tenant of each undivided share was to graze five "sums," equal to thirty-two sheep, on the lands from 15th April in each year to 29th November, but with no right to graze from 29th November to 15th April.

In the year 1907 the tenants from year to year bought the landlord's interest in the lands under the Land Purchase Acts, and the defendant's one undivided twenty-second part of the lands ultimately became vested in one W. H. E., who sold it to the defendant in October, 1922.

The defendant claimed the right to continue to graze thirty-two sheep on the lands during winter, and did so during the winters 1922-1923, 1923-24, and 1924-25, refusing to acquiesce in the arrangement to which all the other co-owners had agreed and conformed.

In an action brought by a number of the tenants in common against the defendant for a declaration that he was not entitled to graze any cattle or sheep on the lands save between 15th April and 12th November; an injunction to restrain such grazing, and claiming also an account, under the statute 6 Anne, c. 10 (Ir.), Section 23, of the profits which the defendant had received out of the lands over and above his just share; (4) damages, or in the alternative partition of the lands, or sale in lieu of partition

*Held* by Wilson J. that the acts complained of did not amount to an ouster of the plaintiffs, and that therefore no damages or injunction could be granted against the defendant, and following *Henderson* v. *Eason* (17 Q.B. 701) that an account under the statute of Anne could not be directed against the defendant for grazing his sheep during the winters.

The usual order for sale in lieu of partition was made in the event of its being certified that more than a moiety of the persons interested desired a sale.

### TRIAL OF ACTION.

The following statement of facts is taken from the judgment of Wilson J.:—These lands are a mountain known as Star Bog, and were formerly the property of Count Ago Balzani, and were let to the tenants on yearly tenancies in 1/22nd shares for grazing purposes. There were twenty-two such lettings, and I am satisfied on the evidence that the right of a tenant of such undivided

share was to graze five sums equal to thirty-two sheep on the mountain from the 15th April in each year to not later than the 29th November, and the grazing tenants had no right to graze anything on the mountain from the 29th November to 15th April. In addition, the landlord provided a shepherd to look after the cattle and sheep and to prevent trespass by unauthorized persons at any time of the year, and by anyone from 29th November to 15th April, and he was remunerated by being allowed to graze a certain number of " sums " on the mountain all the year round. The shepherd's sheep were the only sheep which had a right to graze on the mountain from November to April.

In or about the year 1907 the tenants from year to year bought the landlord's interest in these lands under the Land Purchase Acts, and the defendant's one undivided twenty-second part of the lands was vested in Robert Esler, the defendant's predecessor in title, on 11th April, 1907. After the tenants had each purchased their undivided twenty-second part of these lands, they continued by mutual consent or agreement to exercise their rights as co-tenants in fee simple of these lands as they had formerly done by each grazing five "sums" on said mountain between 15th April to not later than 29th November in each year, and none of them exercised or claimed the right to graze on said mountain from 29th November to 15th April. They also provided a shepherd, and allowed him to graze the mountain all the year as heretofore. Robert Esler transferred his undivided share to William H. Esler on 6th May, 1920, and William H. Esler sold his undivided twenty-second part of said lands to the defendant, Patrick Magill, on 9th October, 1922. The defendant admits that the auctioneer announced at the auction that the purchase of this undivided share would give the purchaser the right to graze five sums, equal to thirty-two sheep, on the mountain; but says that there was nothing said at the auction as to the time during which said sums could be grazed. The defendant has a farm adjoining this mountain, and was brought up there, and knew that the cattle and sheep were removed each year from he mountain in November and were not put on again till the following April.

C.A. 1926.

GINGLES v. MAGILL

Some of the co-owners of these lands had other farms which adjoined the mountain, and there is evidence that their sheep some times trespassed on the mountain during the winter, but they were put off the mountain by the shepherd, and none of the twenty-two owners, save the defendant, has hitherto claimed the right to graze on the mountain from the end of November till the 15th April. It was also proved to my satisfaction on the evidence that if all the co-owners of this mountain continued to graze their five "sums" on this mountain during the winter, the mountain as a grazing mountain would be destroyed and useless. The defendant became registered owner under the Registration of Title (Ireland) Act, 1891, of his twenty-second part of the mountain free from all incumbrances save those mentioned in the Act, and has during the winters 1922-1923, 1923-24, 1924-25, and 1925-26, claimed the right to continue the grazing of the thirty-two sheep on this mountain, and has grazed them on this mountain during those winters, and refused to acquiesce in the arrangement to which all the other co-owners had agreed and conformed. He has also challenged the right of the shepherd to turn his (the defendant's) sheep off the mountain during the winter.

The plaintiffs claimed a declaration that the defendant was not entitled to graze any cattle or sheep on the lands save between 15th April and 12th November; an injunction to restrain the defendant and his servants from grazing the lands save between the foregoing dates; an account of the profits the defendant has received out of the lands over and above his just share as co-tenant with the plaintiffs and others of the lands; damages, or in the alternative, partition of the lands, or a sale thereof in lieu of partition.

*Maxwell, K.C.* (with him *Lowry*) for the plaintiffs:—

No tenant of an undivided share should be permitted to use his property so as to get an unfair advantage out of it. Here the defendant is getting more than his share of the profits of the lands, and is acting so as to deprive his co-tenants of their fair share. The defendant here can be called to account under the statute of Anne. See

the judgment of Lord Hatherley C. in *Jacobs* v. *Seward* (1), at p. 475, where he said, "As regards the statute of Anne, that statute was intended to remedy a grievance which seems to have existed under the common law, namely, that inasmuch as trover would not lie, there appears, until the statute of Anne was passed, to have been great difficulty in a tenant in common getting his just rights with regard to that property which was his in common, but with respect to which he had not received his share. Accordingly the statute of Anne enacted that there should be an account, on behalf of one tenant in common against the other tenant in common, in respect of anything that he had received beyond his just share, and the remedy is there pointed out for taking that account."

We rely on *Job* v. *Potton* (2) and on *Montgomery* v. *Swan* (3). The latter case decided that where one co-tenant received more than his share of the rents of a property, his co-tenant could compel an account, and payment by suit in equity.

On the question of injunction to restrain injury to property, we rely on *Lowndes* v. *Bettle* (4). Destruction is only material when it results in ouster, but the defendant can be called to account under the statute of Anne. We submit that if one of several co-owners does an act which if done by each of the co-owners would result in the destruction of the property, that co-owner has done an act which is obnoxious to the statute of Anne. Each of the co-owners must so use the property as not to destroy the other co-owners rights. The principle sic utere tuo ut alienum non laedas applies a fortiori to co-owners. We submit that the defendant is not entitled to graze sheep on the mountain in winter.

*E. S. Murphy K.C.* and *Porter* for the defendant:—The principle to be derived from the statute 6 Anne, c. 10, has not the remotest bearing on the present case. *Kearney* v. *Kearney* (5) is the only authority that can throw any light on the present existence of the statute 6 Anne, c. 10.

In *Hole* v. *Thomas* (6) Lord Eldon C. said, at p 590: "I never knew an instance of an application to stay waste

(1) 5 H.L.C. 464.
(2) L.R. 20 Eq. 84.
(3) 9 I. Ch. R. 131.
(4) 12 W.R. 399.
(5) 13 I C.L.R. (Q.B.) 314.
(6) 7 Ves. Jun. 589.

CH. DIV. 1926

GINGLES v. MAGILL

by one tenant in common against another: one tenant in common having a right to enjoy as he pleases." The present action is in substance an application by fifteen tenants in common against one tenant in common to stay waste. The defendant makes no claim to put on the lands during the winter months more than thirty-two sheep. We challenge the plaintiffs to show any flaw in the principle enunciated by Lord Eldon in *Hole* v. *Thomas* (1), at p. 590.

The defendant has done nothing that amounts to destruction of the property.

The defendant purchased without any restriction, and is registered as full owner. The plaintiffs are bound to rest their case on the rights of co-owners, the case of the defendant is founded on the ordinary principles of ownership.

The defendant cannot be treated as a tort feasor. All that *Jacobs* v. *Seward* (2) establishes is that where two persons are tenants in common of a field, the merely putting by one of them, a lock upon the gate (not shown to be kept locked), will not constitute an ouster so as to enable the co-tenant in common to maintain trespass. There must, for such a purpose, be other circumstances attending the act. In the present case neither destruction nor damage to the property has been shown.

We submit that the claim for a declaration and injunction must fail. We cannot discover any case which would enable the court to direct an account under the statute of 6 Anne, c. 10.

*Cur. adv. vult.*

Feb 2

WILSON, J. [His Lordship, having stated the facts as above set out] proceeded:—

I find as a fact on the evidence that the method of grazing this mountain by each tenant before the purchase of the fee, and each co-owner since the purchase, grazing five sums in respect of each undivided twenty-second part of their lands from the 15th of April to 29th of November was a proper, reasonable and equitable way of grazing this mountain, and insured that each of the co-tenants or co-owners got an equal share of the benefits of this property. The defendant by grazing his five sums on the

(1) 7 Ves. Jun. 589 (2) L.R. 5, H.L. 464.

mountain all the year round, both summer and winter, is undoubtedly getting an unfair advantage over his co-owners. I am satisfied that if all the co-owners followed the defendant's example the common property would be ruined. At the same time it is proved that this mountain would during the winter months carry more than the sheep allowed to be grazed as remuneration for the shepherd and the thirty-two sheep grazed by the defendant, and it is not proved that the acts of the defendant amount to a destruction of the common property.

This case is one more illustration of the terrible drawbacks of the co-ownership of property if the co-owners cannot agree to some proper and equitable method of working their common property. As I understand the law, one co-owner can make any use he likes of the common property, provided his acts do not amount to an ouster of his co-owners, without being liable in trespass or to an injunction to restrain him : *Jacobs* v. *Seward* (1). He may be restrained by injunction from continuing acts which amount to a destruction of the common property, *Hole* v. *Thomas* (2), but cannot be restrained from committing waste which does not amount to destruction. In this case I cannot find that the defendant has ousted his co-owners from the common property, or that his acts complained of amount per se to a destruction of the common property. I have not been referred to any authority, nor have I been able to find any authority to sustain Mr. Maxwell's contention that an act done by one co-owner, which if imitated by all the other co-owners would result in the destruction of the common property, is in itself an act of destruction and can be restrained by injunction.

In the case of *Henderson* v. *Eason* (3), a case of great authority decided in the Exchequer Chamber by Maule, Cresswell, and Williams J.J., and Parke, Alderson, and Martin B.B., it was found at the trial that the co-tenant had been in possession of the common property, viz., a farm of 133 acres, and that he had cultivated the whole and received all the profits for a number of years and appropriated the profits to his own use. An account under the statute of Anne was ordered against the defendant and a

(1) L.R. 5 H.L. 464.
(2) 7 Ves. Jr. 589.
(3) 17 Q.B. 701.

Ch. Div. 1926

Gingles v. Magill

sum of nine hundred pounds was found due by the defendant to the plaintiff as his share of the profits, but this verdict was upset and the head note states that " if there be tenants in common, and one tenant alone occupy the property, he is answerable, as bailiff, to his co-tenant in an action of account, under the statute of 4 Anne, c. 16, s. 27, if he receive more than comes to his just share, but not otherwise. And he is answerable only for what he receives more than comes to his just share. He receives more than comes to his just share, within the meaning of the statute, if he receives money or something else, given or paid by another, which the co-tenants are entitled to simply by their being tenants in common, and if the amount which he so receives and keeps is more than in the proportion of his interest as such tenant. He does not receive more than comes to his just share within the statute if he merely has the sole enjoyment of the property, even though by the employment of his own industry and capital he makes a profit by the enjoyment and takes the whole of such profit. Therefore, in an action of account, proof of such enjoyment and receipt of the whole profits is not evidence of the occupying co-tenant being bailiff within the meaning of the statute, nor presumptive evidence of his having received more than comes to his just share." And Baron Parke, who delivered the judgment of the court, said, at p. 722, "where the natural produce of the land is augmented by the capital and industry of the tenant, . . . . . or where by feeding it with his cattle he makes a profit by it, the case seems to us to be neither within the words or spirit of the Act, though there are not cases of fructus industriales in either case. We therefore think that upon the evidence set out in this case there was nothing to warrant the jury in coming to the conclusion that the defendant received more than his just share within the meaning of the Act; and that the direction of the learned judge as to the second issue was therefore wrong. And we also think that there was no conclusive or sufficient or, indeed, any evidence that he had the care and management of the farm for their common profit as averred." In my judgment the defendant, by refusing to be bound by the agreement acquisced in by all his co-owners and by insisting in grazing this mountain during the winter months, has caused all the trouble, and I would

restrain him from doing so if I had the power. However, I am coerced by the authorities to find that the acts of the defendant complained of do not amount to an ouster and, therefore, no damages or injunction can be granted against the defendant, and the case of *Henderson* v. *Eason* (1) is conclusive that an account under the statute of Anne cannot be directed against him for grazing his sheep during these last four winters. The only remedy left open to the plaintiffs is their alternative claim for a partition or sale. with all the attendant expense, costs and uncertainty as to its result. It is too bad that these twenty-two co-owners having purchased the fee are now compelled to sell the lands to trustees or another owner, who in future will have the power to regulate the grazing of the mountain equitably between the grazing tenants as the landlord formerly did.

The plaintiffs represent more than a moiety of the co-owners, and ask for a sale in lieu of partition. It would be practically impossible to have an equitable partition of these lands. I will accordingly refer the matter to chambers to ascertain (a) Who now are the owners of these lands in the statement of claim mentioned, and in what shares and proportions. (b) What are the incumbrances on the said lands or on any and, if so, what parts thereof, and the amounts due on foot of said incumbrances, and, on its being certified that notice of this decree has been served on all persons interested in the said lands and that the persons interested in more than one moiety of said lands desire a sale thereof in lieu of partition, I will direct a sale of these lands free from the incumbrances of all incumbrancers who come in and are bound by this suit and subject to the incumbrances of such incumbrancers as are not bound by this decree. I will order the costs of the plaintiffs and defendant up to this hearing to be paid out of the purchase money of said lands, and I reserve all further questions for further consideration with liberty to all persons to apply.

Solicitor for the plaintiffs: *J. W. M'Ninch.*

Solicitors for the defendant: *O'Rorke, M'Donald and Tweed.*

J. M'C.

(1) 17 Q.B. 701.

# INDEX.


ACCOUNT between tenants in common, alleged excessive user by co-tenant. ... ... 234
*See* TENANCY IN COMMON

ACCOUNTS Receiver's— non-conclusiveness ... ... 218
*See* RECEIVER

ADVERTISEMENT BOARD—Man standing at entrance to Arcade with ... ... ... 144
*See* RIGHT or PRIVILEGE

BAILMENT—MINERAL WATER BOTTLES— *Possession— Ownership — Trover and Conversion.* The plaintiffs sold mineral water in bottles branded with their name. The course of dealing with customers was to invoice the bottles at a deposit rate of two shillings per dozen, and when bottles were returned the customers were credited in full. Where bottles were not returned the customers were debited with a charge for them, the plaintiffs usually accepting half the deposit rate for missing bottles where a deficiency was found to exist. The defendant, a dealer, who had obtained possession of 48 dozen of the plaintiffs' branded bottles, refused to deliver them to the plaintiffs. On the hearing of an appeal from a dismiss by the County Court Judge of a Civil Bill claiming damages for trover and conversion. *Held,* by Andrews L.J., reversing the dismiss of the County Court Judge and granting a decree for £2 8s 0d, that the transaction was in law a bailment in which bare possession of the bottles vested in the borrower the true ownership remaining in the lender. *Cantrell & Cochrane Limited* v. *Neeson.*
[APP. 107

BANKRUPTCY — UNEMPLOYMENT INSURANCE AND HEALTH CONTRIBUTIONS—*Priority—Crown debt—Preferential payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict., c. 60)—Costs—Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30)—National Health Insurance (Northern Ireland) Act, 1924 (14 & 15 Geo. 5, c. 16)—Ministries of Northern Ireland (Northern Ireland) Act, 1921 (12 Geo., 5, c. 6).* L. was adjudicated a bankrupt on 10th June, 1925. A claim was made by the Ministry of Labour against his assets (1) for four months' arrears due in respect of Unemployment and Health Insurance contributions as preferential payments under the Bankruptcy (Ireland) Act, 1889, (2) for further arrears alleged to be recoverable as Crown debts ranking next after the usual preferential payments. The Registrar in Bankruptcy allowed all the claims in full. On an application by the assignee in bankruptcy to vary the Registrar's certificate as regards the second claim, it being admitted at the hearing that the application failed in respect of arrears of Unemployment Insurance contributions *Held,* by Brown J. that Health Insurance contributions were recoverable only as a civil debt and that the certificate must be varied accordingly. *Held,* further, that the Ministry of Labour were liable to pay costs as they were claiming by virtue of their functions as Insurance Commissioners and not as a Crown department. *Re Lindsay, a Bankrupt.*
[K.B.D. BANKCY. 128

BUILDING GROUND— ... 167
*See* LANDLORD & TENANT (1).

CASES—*Browne's Estate*—19 L.R. Ir. 185 applied ... ... ... 218
*See* RECEIVER.

*Byrne v. Meath*—42 I.L.T.R. 43 followed.
*See* TOWN TENANT.

*Canning v. Farren*—1907. 2 J.R. 486, J.R. 486, approved and applied approved and applied ... 92
*See* HIGHWAY.

*Geddis v. Bann River Reservoir*—3 App. Cas., applied ... 430
*See* NEGLIGENCE (1).

*Henderson v. Eason*—17 Q.B. 701, applied ... ... ... 234
*See* TENANCY IN COMMON

*Luby v. Warwickshire Mines Association*—1912, 2 Ch. 371, applied. ... ... ... ... 1
*See* TRADE UNION.

CHILD OF TENDER YEARS—Unsworn evidence corroboration. ... ... ... ... 208
*See* CRIMINAL LAW EVIDENCE.

COMPANY—DISSOLVED COMPANY—APPLICATION TO RESTORE TO REGISTER—*Companies (Reconstitution of Records) Act (Northern Ireland)13 & 14 Geo. 5, N.I., c. 6.* A company, which failed to comply with the provisions of the Companies (Reconstitution of Records) Act (Northern Ireland), 1923, and was thereupon dissolved in accordance with the provisions of the statute, may be "replaced on" and "restored to" the Register of Joint Stock Companies in accordance with the provisions of Sect. 5, s.-s. 4. "Replaced" and "restored" are to be read as "placed," implying a first registration of the company in Northern Ireland. *In re The Clonard Brick and Estate Company, Limited.*
[CH. DIV. 47

CONTRIBUTION—Claim for, towards payments made to redeem mesne interest ... ... 218
*See* RECEIVER.

CORROBORATION—Unsworn evidence of child of tender years. ... ... ... ... 208
*See* CRIMINAL LAW—EVIDENCE

COSTS—Liability of Ministry of Labour claiming as Insurance Commissioners to pay ... ... 128
*See* BANKRUPTCY.

CRIMINAL LAW — EVIDENCE — CHILDREN OF TENDER YEARS—*Indecent Assault—Corroboration—Nature of corroboration required—Children Act, 1908 (8 Edw. 7 Ch. 67) Section 30 (a)—Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5 Ch. 58) Section 28 (2).* The prisoner was indicted for an indecent assault on a girl under the age of thirteen years. At the trial, there was admitted (a) the unsworn testimony of the child alleged to have been assaulted and of two other children of tender years, (b) the evidence of the mother of the girl alleged to have been assaulted. The mother stated that she had asked the child where she had been and what she was crying about. The child's reply was a complaint of the prisoner's conduct to her. The trial took place before Andrews L.J., who allowed the case to go to the jury, who returned a verdict of "guilty." *Held* by the Court of Appeal (Moore C.J., Best L.J., Wilson and Brown (J.J.) that the unsworn testimony of a child of tender years admitted by virtue of section 30 of the Children Act, 1908, could not be corroborated within the meaning of proviso (a) to that section, by the unsworn testimony, similarly admitted, of any number of such children; and *held* also that assuming the answers of the girl to her mother's questions to have been properly admitted, they were not evidence of the facts complained of, and could not constitute corroboration of these facts within the meaning of section 30 of the children Act, 1908. *Rex v. Coyle.*
[APP. 208

DESERTION— ... ... 75
*See* HUSBAND and WIFE.

DISCOVERY—
*See* PRACTICE—DISCOVERY.

EVIDENCE—Unsworn, of child of tender years ... ... 208
*See* CRIMINAL LAW EVIDENCE.

EXPULSION OF MEMBER by Branch Committee of Trade Union ... ... ... 1
*See* TRADE UNION.

FENCE—Liability of Railway Company—adjoining lands—seashore. ... ... ... ... 68
*See* RAILWAY COMPANY.

FORFEITURE— ... ... 50
*See* LANDLORD & TENANT (3)

GENERAL WORDS— ... 144
*See* RIGHT OR PRIVILEGE.

HIGHWAY—DAMAGE CAUSED BY ANIMAL DOMITAE NATURAE—*Escape, from unfenced lands of owner, on to other lands and thence to highway—Absence of proof of negligence—Pro-*

*cedure—Death of defendant appellant after hearing and statement of case by Judge of Assize—Revivor.* The plaintiff's motor car collided with a dark brown heifer belonging to the defendant which had strayed from the defendant's unfenced land and came suddenly out on to the highway at about 12-20 a.m. from the land of an adjoining owner; the motor car was overturned and the plaintiff sustained injury. There was no negligence in the driving or management of the motor car. *Held* by the Court of Appeal (Andrews and Best L.J.J.) that there is no obligation on an owner of land adjoining a highway to fence his lands in such a manner as to keep his animals from straying on the highway, and there being neither nuisance nor negligence on his part the defendant was not liable to the plaintiff. Subsequently to the hearing of the appeal by the Judge of Assize (Moore, then L.J.) and to the statement of the case and to service of the notice of appeal the defendant appellant died. *Held*, that there was jurisdiction to revive the proceedings, and the Court of Appeal on the application of counsel for the executors of the defendant made an order for revivor. *Canning* v. *Farren* [1907] 2 I.R. 486) approved and applied. *Hall* v. *Wightman.*

[APP. 92

HUSBAND AND WIFE—DESERTION *—Married Woman—Temporary Agreement to separate—Married Women (Maintenance in Case of Desertion) Act, 49 & 50 Vict., c. 42.* A husband and wife agreed to separate immediately after their marriage until the husband, who was a constable in the Royal Ulster Constabulary, had sufficient length of service to permit him to support his wife. When the agreement expired the husband refused to co-habit with his wife and refused and neglected to maintain her. On a summons by the wife against the husband for desertion, the magistrates at the hearing were of the opinion that the husband had deserted his wife, and gave judgment against him. On a case stated for the opinion of the King's Bench Division, *Held*, that the decision of the magistrates was correct. *Timoney* v. *Timoney.*

[K.B.D. 75

IMPROVEMENTS — Compensation for ... ... ... 119
*See* TOWN TENANT.

LANDLORD AND TENANT (1)—BUILDING GROUND—*Exclusion from operation of Northern Ireland Land Act, 15 & 16, Geo. 5, ch. 54, s. 8, s.s. 3 (d)—Onus of proof—Scope of appeal.* Four holdings in the vicinity of the City of Belfast were not included in a provisional list of land to become vested in the Land Commission under section 17 sub-section 2 of the Northern Ireland Land Act, 1925, as the result of a preliminary investigation by the Land Purchase Commission, on the ground that each holding possessed "a substantial value or utility whether potential or actual as building ground." On objections by the four tenants to this exclusion, the Land Commissioners, having heard evidence, declared that the lands forming the subject matter of the four objections did not possess "a substantial value or utility whether potential or actual as building ground," and accordingly allowed the four objections. *Held*, by the Court of Appeal (Moore C.J., Andrews and Best L.JJ.), reversing the judgment and order of the Land Commissioners that in sub-section 3 (d) of section 8 of the Northern Ireland Land Act, 1925, the word "substantial" qualifies both the words "value" and "utility," and that the words "whether potential or actual" must be read as qualifying or enlarging both the words "value" and "utility," and that the holdings in question possessed a value or utility for building purposes within the meaning of the subsection. *Held* further, that where lands are agricultural the onus of proving that holdings are excepted from the operation of the compulsory purchase provisions of the Act lies on the landlord. *Held* further, that an appeal lies from the order of the Land Commissioners as well on questions of fact as on questions of law. *Lyle's Estate.*

[APP. 167

LANDLORD AND TENANT (2)—EJECTMENT *to recover part of a mountain holding for use as turbary—Expiration of second statutory term—Present tenancy—"Conditions" of tenancy—"Incidents" of tenancy—Notice to Quit (Ireland) Act, 1876 (39 & 40 Vict., c. 63), sect. 3—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49) sect. 5—Land Law (Ireland) Act, 1891 (59 & 60 Vict., c. 48) section 3 (1).* A landlord after the expiration of a second statutory term brought an

action of ejectment founded on notice to quit under section 3 of the Notice to Quit (Ireland) Act, 1876, for part of a mountain holding, consisting of a turf bog, with a view to its use and development for the purposes of turbary. The defendant was a present tenant of the lands. *Held*, that upon the true construction of section 5 of the Land Law (Ireland) Act, 1881, the tenant's right to retain possession of a holding in which a present tenancy existed was an incident of the tenancy and not one of its statutory conditions, that such incident is not preserved for the benefit of the tenant by section 3 (1) of the Land Act of 1896, and accordingly that the plaintiffs were entitled to maintain the action under section 3 of the Notice to Quit (Ireland) Act of 1876, and that this right was in no way prejudiced or affected by the provisions of the Land Acts of 1881 and 1896. *Bruce* v. *Jackson* (1).

192

LANDLORD AND TENANT (3)—Lease Forfeiture—*Covenant not to erect buildings of less than a certain valuation—Buildings contravening the covenant erected prior to execution of lease—Term of lease expressed to run from date prior to erection of buildings.* The plaintiff demised to the defendant certain premises by a lease which contained a covenant forbidding the erection of any dwelling-house erection or building of a less poor law valuation than £16 at the least. The term was expressed to run from a date prior to its execution. Certain buildings of a temporary character and of the class forbidden by the covenant had been erected on the premises prior to the execution of the lease. The plaintiff served on the defendant a notice under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41) s. 14, sub.-s. 1 requiring that the buildings should be removed. On the defendant failing to comply with this notice, action was brought. *Held*, that the covenant took effect only from the execution of the lease and not from the date from which the term was expressed to run; hence there was no breach of the covenant and no forfeiture. *Bennett* v. *Kidd and Others.*

[K.B.D. 50

LANDLORD AND TENANT (4)—Lease—*Breach of Covenant to maintain licence—Spirit Grocery—Covenant by Lessee to use premises as a Spirit Grocer's and Beer Retailer's shop and to maintain the Spirit Grocer's Licence attached to the premises—Non-renewal of Licence—Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 Geo. 5, c. 12), s. 2.* By an indenture of lease made in 1901 M. M. demised to J. R. certain premises described as "all the messuage, shop, and dwelling-house known as No. 4, Dawson Street, in the City of Belfast, for a term of 1970 years. The lease contained covenants by the lessee to use the premises as a spirit grocer's and beer retailer's shop or as a public house or inn, and to preserve the spirit grocer's licence attached to the premises, and not to do anything which might prejudically affect the licence or might cause the refusal of the renewal of the licence. There was a proviso for re-entry in the event of the lessee failing to observe the covenants. Subsequently the interest of the lessor became vested in the plaintiff, and that of the lessee in the defendant. The defendant carried on the business of a spirit grocer in the premises until after the passing of the Intoxicating Liquor Act (Northern Ireland), 1923, and ceased to do so in January, 1924. In 1924, the renewal of the licence was refused on the ground that a "trade other than the sale of any intoxicating liquor or of table waters" was carried on, and compensation was subsequently awarded to the defendant by reason of the lapse of the licences. In an action for recovery of possession of the premises, and for damages:—*Held* by the Court of Appeal (Moore C.J. and Andrews L.J.), reversing the judgment of Brown J., that as the defendant had brought about the refusal of the renewal of the licence by her own act, the plaintiff was entitled to judgment for possession and to damages for breaches of covenants. *Maguire* v. *Day.*

[K.B.D. 80

LICENCE—Breach of Covenant to maintain ... ... ... 80
*See* Landlord & Tenant (4).

MILK—Sale of outside limits of Market ... ... ... 58
*See* Tolls—Market.

MINERAL WATER BOTTLES— ... ... ... ... 107
*See* Bailment.

NEGLIGENCE (1)—NEGLIGENT EXERCISE OF STATUTORY POWERS—*Canal Navigation Company—Flooding of adjoining lands—Damages appropriate remedy not statutory compensation—Abatement of nuisance by person injured—19 & 29 Geo. 3, c. XXXII. (Ir.) sects. 1 and 13; 54 Geo. 3, c. CCXXXI., s. 2; 6 & 7 Vict. c. CIV. (Local), ss. 2, 5, 62, 144, 204.* A private Act of 27 Geo. II. c. III. empowered a corporation to make a canal; under subsequent Acts large sums of money were subscribed by different persons for the purpose of carrying on and improving the navigation of the said canal; and by Act of Parliament 54 Geo. III. c. ccxxxi. (Local), a company of undertakers was incorporated and all the property of the canal was vested in the said company. By 6 and 7 Vict. c. civ. (Local), all the property, rights, and liabilities of the said company were transferred to and vested in the plaintiffs. The main purpose of these several Acts of Parliament was to make a navigable waterway by canalizing a river and cutting a canal. In 1912 the plaintiffs raised the coping round one of the locks and the banks behind it about fifteen inches to prevent flood water flowing over the sides of the lock which they alleged interfered with the navigation of the canal. The defendants alleged that by such works the plaintiffs had penned back the flood water on the defendants' lands. In 1921 the plaintiffs removed the raised coping without prejudice to their right, but this did not reduce the height of the banks. In January, 1924, there was a heavy flood in the river and canal, and the defendants cut away a sufficient amount of the banks to allow the flood water to run away. In an action by the plaintiffs for an injunction to restrain the defendants from entering upon the lands of the plaintiffs, and from digging, excavating, removing or interfering with the soil. *Held*, by the Court of Appeal (Moore C.J. and Andrews L.J.) reversing Wilson J., that though the plaintiffs were entitled under their private Acts, from time to time to amend their canal works, they were bound in so doing to take reasonable precautions to prevent the defendants' lands being flooded; that their failure to do so amounted to negligence; and applying *Geddis* v. *Bann River Reservoir* (3 App. Cas. 430) that the plaintiffs were liable for the resulting damage to the defendants. *Held* further that the defendants' remedy was damages for the tortious and negligent acts complained of, and not compensation for loss resulting from a legitimate exercise of powers under the statute authorizing the plaintiffs' works. *The Lagan Navigation Company, Ltd.*, v. *The Lambeg Bleaching, Dyeing and Finishing Co., Ltd.*
[CH. DIV. 13, APP. 27

NEGLIGENCE (2)—LIABILITY OF OWNER OF MOTOR BICYCLE—*Motor bicycle collision—Authority given by owner to rider of motor bicycle——Master and Servant—Agency.* The plaintiff G. was driving an outside car on which the plaintiff T. was a passenger. A motor bicycle, the property of the defendant, which was ridden by H. R., defendant's brother, collided with and overturned the outside car and injured the plaintiffs. Each of the plaintiffs sued the defendant for damages for injuries caused by the negligence of the rider, which was admitted, and evidence was given to show that at the time of the accident H. R. was acting as agent for the defendant. The defendant stated that his brother had general permission to ride the motor bicycle for himself or for the defendant, but that he never was in the defendant's employment. The trial judge declined to direct in the defendant's favour on the question of agency, and left it to the jury to find whether the rider was acting as the agent or servant of the defendant in the management of the motor bicycle at the time of the accident. The jury answered this question in the affirmative, and found £6,388 and £150 damages in the two actions against the defendant. The defendant moved to have the verdicts set aside and judgment entered for him in the actions:—*Held*, by the Court of Appeal (Andrews and Best, L.JJ.), that the jury could properly find as they had done, that their findings and verdict must stand, and that the defendant's motion should be dismissed with costs. *Thompson* v. *Reynolds. Gibson* v. *Reynold.*
[APP. 131

OWNER of Motor Bicycle, Liability of for negligence of agent ... 131
*See* NEGLIGENCE (2).

PRACTICE—DISCOVERY—PARTY—*Action for breach of covenant in Lease—Assignment by defendant after action brought—Assignee substituted for original defendant—Order for Discovery against original defendant refused—R.S.C. 1905 O. 31 r. 12, O. 16*

*r. 12, O. 28 r. 11.* The plaintiff brought an action against B. Company claiming damages for breach of the covenants in a lease of certain property. B. Company having assigned their interest in the lease to I. Company, the Court by order dated 23rd June, 1925, substituted I. Company as defendant in place of B. Company and stayed all further proceedings against B. Company. The plaintiff now sought an order that B. Company should make discovery of documents. *Held*, that the plaintiff was not entitled to the order as B. Company was no longer a party to the action. *Held*, further, that B. Company could not be joined as a party under R.S.C. 1905 O. 16, r. 12 simply for the purpose of making discovery of documents. *Held*, further, that the order staying proceedings against B. Company could not be varied under R.S.C. 1905 O. 28, r. 11, as there was no clerical mistake. *Bailie* v. *Inglis & Company, Limited and Jamison* (1).

[K.B.D. 53

PRESENT TENANCY—Expiration of statutory term ... ... 192
*See* LANDLORD & TENANT (2).

RAILWAY COMPANY—LIABILITY TO FENCE—*Railway line unfenced at sea shore—Railway Regulation Act, 1842 (5 & 6 Vict., c. 55) s. 10—Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20) s. 68—County Down Railway Act, 1846.* The plaintiff was tenant of certain grazing land bounded on one side by a bank which bordered the sea shore. There was no fence between this bank and the sea shore, nor anything to prevent cattle from getting on to the sea shore. One of the plaintiff's cows went from the bank to the sea shore and wandered on to the railway line at a point where it was unfenced and it was killed. In proceedings by Civil Bill against the company for negligently failing in their statutory duty to fence their railway, *Held*, by the Court of Appeal (Moore C.J. and Andrews L.J.) that the Railway Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 20) imposed no obligations on railway companies to fence lands save as regards adjoining lands and the owners thereof, and that therefore the company was not liable. *The Belfast and County Down Railway, Respondent*

[K.B.D. 68

RECEIVER — UNAUTHORIZED PAYMENTS BY — ACCOUNTS — NONCLUSIVENESS OF—*Claims for contribution to payments made to redeem a mesne interest, from persons deriving thereunder—Duty and responsibility of solicitor having carriage.* Certain property was granted by a fee farm grant of 1891 to D. M. Prior to 1898 D. M. made various sub-grants. In 1898 a further grant of adjoining property was made to D. M., who charged the head rent reserved by the later grant on the premises comprised in the earlier grant. D. M. from time to time created various sub-interests in the premises held under his second grant, among others one to J. C., who was the plaintiff's testator. The sub-rents arising out of the first rent were more than sufficient to pay that head rent, but the lands held under the second grant were always insolvent. In 1908, the head rent under the later grant having fallen into arrear, the head landlord obtained judgment for possession. J. C., to prevent the lands being evicted, paid the head rent due, and brought an action against D. M. and others claiming contribution in respect of the payment he had made. J. C. obtained judgment against D. M. and all the sub-grantees whose interests were created after the 22nd August, 1898, the date on which second grant was registered; it being held that the charge of the rent did not affect any interest, arising under the first grant, created prior to registration of the second grant. The head rent of the grant of 1898 again fell into arears, and J. C. again redeemed brought a second and a third action for contribution from the same persons against whom he had got judgment in the previous action. In 1915 a Receiver was appointed on the motion of J. C., over the interests in the lands of the defendants in the three actions. The Receiver, at the instance of J. C.'s solicitor, kept only one account for the two estates; he also spent large sums on repairs without sanction of the Court and paid the head rent reserved by the grant of 1898 first out of monies received from the lands held under the grant of 1891. J. C. and some of the defendants in the actions were represented before the Receiver Examiner at the passing of the Receiver's accounts and did not at any time raise any objection. As a result of the Receiver's mismanagement the head rent of the lands held under the grant of 1891 fell into arrears, and after action brought, the head land-

lord was put into possession by a writ of habere, J. C. redeemed, having, as he claimed, acquired an interest in these lands by his judgments obtained in the prior actions. J. C. then brought the present action against all persons interested in the lands held under both grants, seeking a declaration that the rent so paid by him was a good salvage payment, that it was well charged upon the lands held under the grant of 1891, and that the defendants were liable to contribute proportionately to the salvage payment. He also sought to make the defendants personally liable, an order for sale of their interests in default of payment, and that the Receiver should be extended to the present claim. J. C. died before the trial of the action, which was continued by A. C. and J. H. C., his executors, the present plaintiffs. The Attorney-General was sued as representing the heir-at-law of D. M., who died in 1916. Wilson J. dismissed the action and the plaintiffs appealed. *Held* by the Court of Appeal (Moore C.J. and Brown J.) that the appeal should be dismissed with costs on the ground (a) that the eviction arose from the unauthorized payments made by the Receiver; (b) that the Solicitor for J. C. having carriage of the suit must be taken to have had full knowledge and notice of all the irregularities that were being committed from which in the discharge of his duty to the Court, he should have protected the estate; and (c) that consequently the present plaintiffs, the representatives of J. C., could not claim recoupment of money paid by them in an emergency created by their own default. *Held* further applying *Browne's Estate* (19 L. R. Ir. 185) that the passing of accounts in the receiver office was mere vouching. and that such accounts might be re-opened. *Craig* v. *Attorney-General and Others.*

[APP. 218

REVENUE—INCOME TAX—CARRYING ON OF A TRADE—*Company in liquidation—Review of decision of Special Commissioners upon Case Stated—Appeal to Recorder—Effect of decision of Recorder given in previous year—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Schedule D., and ss. 149, 195 and 196.* The respondent Company carried on a large distilling business. In July and August, 1920, the shareholders passed resolutions for a voluntary winding up. The Liquidator, with a view to realization, did some distilling, but no distilling was done after the end of the tax year, 1920-21. In the tax year 1921-22 large sales of stock were effected. The Company was assessed to income tax for that year on the basis of the three preceding years, and on the footing that the Liquidator had carried on a trade in the year of assessment. There was an appeal to the Special Commissioners, who discharged the assessment on the ground that an assessment for the preceding year had been discharged by the Recorder of Belfast on appeal, and that they held themselves bound to follow that decision. The King's Bench Division (Sir Denis Henry, Bart., C.J. and Brown J.) held that the Special Commissioners were not bound by the decision of the Recorder in respect of the previous tax year, and accordingly made a declaration to that effect, and referred the matter back to the Commissioners to proceed according to law. *Held*, by the Court of Appeal (Moore and Andrews L.JJ.), that the decision of the King's Bench Division was right, but varying the order remitted the matter to the Special Commissioners with a direction " that they should find as a matter of fact and wholly apart from the decision of the Recorder whether the profits in the year 1921-22 in respect of which assessment was made arose (a) from the carrying on of the trade, or (b) from realization sales and capital transactions incidental to the winding up of the business; and that they should thereupon proceed to affirm or discharge the said assessment according to law." *Held*, by the House of Lords (Viscount Cave C., Viscount Haldane and Lords Atkinson, Shaw of Dunfermline and Sumner), affirming the Court of Appeal, that the Special Commissioners were not bound by the decision of the Recorder in respect of the year 1920-21, and that they should have gone into the facts and arrived at their own conclusions. *Edwards* v. *The Old Bushmills Distillery, Company, Limited.*

[APP. 155, H.L. 162

REVIVOR—Death of defendant after hearing of case stated. ... 92
*See* HIGHWAY.

RIGHT OR PRIVILEGE *to advertise premises by means of man standing with a board at entrance to arcade leading to cafe—Property demised together with "all rights, liberties, privileges, and appurtenances to*

*the said premises belonging or in any wise appertaining or therewith used or enjoyed"—Right known to the law—General words—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 6 sub-s. 2.* The defendants, the proprietors of a licensed house and cafe in Belfast, claimed the right to advertise their premises by keeping a man with an advertisement board at the entrance to the Q. Arcade, which led up to and past defendant's premises. The plaintiffs were the owners of the Q. Arcade and the shops in it, and also of the shops in D. Place adjoining the entrance to the arcade. The plaintiffs had acquired this property in 1919, subject to the tenancies then existing. The defendant's premises were let on 20th July, 1899, to P. & F. M'G. for 21 years from 1st May, 1899, at an annual rent of £250. On 29th April, 1920, the plaintiffs made a quarterly letting of the premises to P. M.'G. at an annual rent of £600, and by a lease dated 15th February, 1921, the plaintiffs let the premises to P. M.'G. in consideration of a fine of £12,000, at a peppercorn rent for one hundred years. The defendants' premises, while held under the lease of 20th July, 1899, were advertised amongst other means by a man standing with an advertisement board at the entrance to the arcade. In 1912, when structural alterations were made in the Arcade, it was arranged that thenceforth the defendants could always advertise their premises by means of a man standing with a board at the entrance to the Arcade. In an action for a declaration that the defendant was not entitled to advertise his premises by means of a man standing with an advertisement board at the entrance to the Arcade. *Held*, by the Court of Appeal (Andrews and Best L.JJ.), affirming the judgment of Wilson J., that the right or privilege claimed was a legal one, and that it passed to the defendant as lessee by virtue of the general words of the lease of 15th February, 1921, dealing with "rights, liberties, privileges, and appurtenances." *Henry, Limited* v. *M'Glade* (1).

[App. 144

STATUTORY CONDITIONS of tenancy. ... ... ... 192
*See* LANDLORD & TENANT (2)

STATUTORY POWERS—Negligent exercise of ... ... 13.27
*See* NEGLIGENCE (1).

STATUTES—
——6 Anne (Ir.) c. 10, sec. 23 ... 234
*See* TENANCY IN COMMON.

——5 and 6 Vict., c. 55, s. 10 ... 68
*See* RAILWAY COMPANY.

——8 and 9 Vict., c. 20, s. 68 ... 68
*See* RAILWAY COMPANY.

——39 and 40 Vict., c. 63, sec. 3 ... 192
*See* LANDLORD & TENANT (2)

——44 and 45 Vict., c. 41, s. 6 ... 144
*See* RIGHT OR PRIVILEGE.

——44 and 45 Vict., c. 49, s. 5 ... 192
*See* LANDLORD & TENANT (2)

——49 and 50 Vict., c 52 ... ... 75
*See* HUSBAND AND WIFE.

——52 and 53 Vict., c. 60 ... 128
*See* BANKRUPTCY.

——59 and 60 Vict., c. 47, sec. 3 (1) ... ... ... ... 192
*See* LANDLORD & TENANT (2)

——6 Edw. 7, c. 47, s. 4 ... ... 1
*See* TRADE UNION.

——6 Edw. 7, c. 54 ... ... 119
*See* TOWN TENANT.

——6 Edw. 7, ch. 67, sec. 30 ... 208
*See* CRIMINAL LAW—EVIDENCE

——4 and 5 Geo. 5, c. 58, sec. 28 (2). ... ... ... ... 208
*See* CRIMINAL LAW—EVIDENCE

——8 and 9 Geo. 5, c. xxi., s. 239 (Londerry Corporation) ... 58
*See* TOLLS—MARKET.

——8 and 9 Geo. 5, c. 40, sch. D., ss. 149, 195, 196 ... 155, 162
*See* REVENUE INCOME TAX.

——10 and 11 Geo. 5, c. 30 ... 128
*See* BANKRUPTCY.

——12 Geo. 5 (N.I.), c. 6 ... 128
*See* BANKRUPTCY.

——13 and 14 Geo. 5 (N.I.) c. 6 ... 47
*See* COMPANY.

——13 and 14 Geo. 5 (N.I.), c. 12 80
*See* LANDLORD & TENANT (4)

——14 and 15 Geo. 5 (N.I.), c. 16 ... ... ... ... 128
*See* BANKRUPTCY.

——15 and 16 Geo. 5 (N.I.), c. 54, sec. 8 ... ... ... 167
*See* LANDLORD & TENANT (1)

STATUTORY RULES & ORDERS—R.S.C. 1905, Or 16 or 12; Or 28 or 11; Or 30 r. 12 ... ... 53
*See* PRACTICE DISCOVERY.

TENANCY IN COMMON—EXCESSIVE USER BY ONE CO-TENANT — *Injunction not granted in absence of proof of actual damage. Nor account under 6 Anne (Ir.)* 1 *c. 10, s. 24—Usual order for partition and sale.* Certain mountain lands were let to tenants on yearly tenancies in twenty-two undivided shares for grazing purposes. The right of the tenant of each undivided share was to graze five "sums" equal to thirty-two sheep, on the lands from 15th April in each year to 29th November, but with no right to graze from 29th November to 15th April. In the year 1907 the tenants from year to year bought the landlord's interest in the lands under the Land Purchase Acts, and the defendant's one undivided twenty-second part of the lands ultimately became vested in one W. H. E., who sold it to the defendant in October, 1922. The defendant claimed the right to continue to graze thirty-two sheep on the lands during winter, and did so during the winters 1922-1923, 1923-24, and 1924-25, refusing to acquiesce in the arrangement to which all the other co-owners had agreed and conformed. In an action brought by a number of the tenants in common against the defendant for a declaration that he was not entitled to graze any cattle or sheep on the lands save between 15th April and 12th November; an injunction to restrain such grazing, and claiming also an account, under the statute 6 Anne, c. 10 (Ir.), section 23, of the profits which the defendant had received out of the lands over and above his just share; (4) damages, or in the alternative partition of the lands, or sale in lieu of partition *Held* by Wilson J. that the acts complained of did not amount to an ouster of the plaintiffs, and that therefore no damages or injunction could be granted against the defendant, and following *Henderson* v. *Eason* (17 Q.B. 701) that an account under the statute of Anne could not be directed against the defendant for grazing his sheep during the winters. The usual order for sale in lieu of partition was made in the event of its being certified that more than a moiety of the persons interested desired a sale. *Gingles and Others* v. *Magill.*

TOLLS—MARKET—SALE OF MILK OUTSIDE THE MARKET, *but within the limits of City of Londonderry—Londonderry Corporation Act, 1918 (8 & 9 Geo. 5, c. XXI.) s. 239.* A local Act (8 and 9 Geo. 5 c. xxi) to make further and better provision for the improvement, health and local government of the city of L., provided by c. 239 (that (a) "notwithstanding anything contained in the Act of 1848 or the Act of 1896, the Corporation may demand and receive for the use of their markets, and of the stalls and standings therein, and in respect of animals and things brought into the market, and for the use of their slaughter-houses, weighing-houses, and weighing-places and machines such stallages, rents, tolls and charges as the Corporation may from time to time appoint not exceeding such stallages, rents, tolls or charges as may for the time being be prescribed by the Local Government Board upon the application of the Corporation; and any stallages, rents, tolls and charges so prescribed shall be substituted for the stallages, rents, tolls, or charges specified in Schedule (D) to the Act of 1848 and in Schedule B. to the Act of 1896. (b) Unless and until any stallages, rents, tolls and charges shall be prescribed by the Local Government Board in pursuance of this section nothing in this section contained shall affect the right of the Corporation to demand and receive the stallages, rents, tolls and charges which they are now authorized to take." The Corporation by resolution made a revised schedule of market tolls, which was duly approved by the Local Government Board. By this schedule, in accordance with the Act, the tolls on sweetmilk were increased as follows:—"Sweet milk. For each quantity of 25 gallons or part thereof per day, sixpence." The defendant is a supplier of milk daily to certain customers in the City of L. The milk is despatched from outside the city by the defendant, in his own carts and by his own servants, and it is sold within the city boundary to his customers. It is not sold in the market, and in respect of its sale the plaintiffs do not render any services to the defendants. *Held*, by the Court of Appeal (Andrews and Best L.JJ.) that the plaintiffs were not entitled to charge the in-

creased rate of toll under section 239 of the 8 & 9 Geo. 5, c. xxi. *Londonderry Corporation* v. *Osborne.*
[APP. 58

TOWN TENANT—COMPENSATION FOR IMPROVEMENTS—*Tenant not in physical occupation of premises—Town Tenants (Ireland) Act, 6 Edw. 7, c. 54—Landlord and Tenant (Ireland) Act, 23 & 24 Vict., c. 154—Landlord and Tenant (Ireland) Act, 33 & 34 Vict., c. 46—Land Law (Ireland) Act, 44 & 45 Vict., c. 49.* On a claim for compensation for improvements made under the Town Tenants (Ireland) Act (6 Edw. 7, c. 54) by a tenant not in physical occupation of the demised premises at the expiration of his term, *Held*, that the applicant was not a tenant as defined by Section 18 of the Act, *Byrne* v. *Meath* (42 I.L.T.R. 43) followed and approved. *McFarland and Talbot* v. *Montgomery.*
[APP. 119

TRADE—Carrying on of ... 155, 162
*See* REVENUE INCOME TAX.

TRADE UNION—RULES—*Expulsion of Member by Branch Committee—Ultra Vires—Injunction—Action of Tort—Competency—Trades Disputes Act, 1906 (6 Edw. 7, c. 47) s. 4, sub-s. 1.* One of the rules of a workers' Trade Union provided that any member disseminating false statements or any rumour which tended to depreciate the organisation, its officers, or any section appertaining to the Union should be dealt with by the branch or Union as might be deemed fit. The plaintiff, a member of the Union, having formulated charges, which he failed either to withdraw or to substantiate, of bribery, drunkenness, corruption and inefficiency against the Committee, was summoned to attend a meeting and having had a full opportunity of explaining his position was expelled by the Branch Committee. In an action by the plaintiff seeking to have the resolution of expulsion declared ultra vires and void and also claiming damages against the defendants for having prevented him from obtaining employment. *Held*, by Andrews LJ., that the rule while conferring a wide power to deal with recalcitrant members in no way empowered the Branch Committee to determine membership. A power of expulsion must be found in the rules and does not exist apart from them. *Luby* v. *Warwickshire Miners' Association* ([1912] 2 Ch. 371) applied. *Held* further that the action, so far as it sought damages for alleged tortious acts by the secretary or Committee of the Trades Union, could not be entertained inasmuch as Section 4 (1) of the Trades Disputes Act, 1906 (6 Edw. 7 c. 47) conferred such a general immunity upon Trade Unions as even to make it obligatory upon the Court to stay such an action as soon as it is made aware of its existence. *Clarke* v. *Stanley Ferrie and Others.*
[CH. DIV. 1

UNEMPLOYMENT INSURANCE and HEALTH INSURANCE—Contributions—Priority of... 128
*See* BANKRUPTCY.

WORDS—"Replaced" ... ... 47
*See* COMPANY.

——"Rights, liberties, privileges and appurtenances" ... ... 114
*See* RIGHT OR PRIVILEGE.

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